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REPORTS OF CASES

IN THE

County Courts of the Fifth Circuit,

AND IN THE

HIGH COURT of ERRORS & APPEALS,

OF THE

STATE OF PENNSYLVANIA.

AND

Charges to Grand Juries

OF THOSE

COUNTY COURTS.

By ALEXANDER ADDISON,

PRESIDENT OF THE COURTS OF COMMON PLEAS OF
THE FIFTH CIRCUIT OF THE STATE
OF PENNSYLVANIA.

WASHINGTON:

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IN PHILADELPHIA.

1800.

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ADVERTISEMENT.

IT is not for me to say how many or what are the Faults of the following Notes. What I consider as most incumbent on me to mention is, in some Cases, the Imperfection, and, in some Cases, the Omission of the Statement of the Arguments of Counsel.

The Observations from the Bench, in the Course of a Trial are taken from hasty Notes made by me at the Time. Opinions on Law Points, formed on greater deliberation, are taken from the Notes of those Opinions drawn up for Delivery.

Decisions being Constructions of the Law, it is of Importance, that they be known; and it seems to me, that the Legislature ought to promote their Publication. This might be done if the Governor were authorized to purchase such a number of Copies of the Decisions of the several Courts, as would defray the Expence of Publication, and distribute them, as the Laws are distributed. Some qualified

Person might thus be induced to collect and publish the Decisions of the several Courts. To set an Example of this, I am willing to risk Reputation of Skill by what may perhaps be deemed a premature Publication of the following Notes. If Decisions were generally published, the Errors of one Court would be corrected by the Accuracy of another, and uniformity be accomplished.

The Acts of Congress 1 U. S. L. or 2 U. S. L. cited refer to the Edition in two Volumes, printed by E. Oswald; 3 U. S. L. to the Pamphlets printed by F. Child and J. Swaine; and 4 U. S. L. to the Pamphlet printed by F. Childs. The Acts of Assembly St. L. are cited from Mr. Dallas's Edition of the Laws of this State.

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REPORTS OF CASES, &c.

ALLEGHENY COUNTY,

September Term, 1791.

PENNSYLVANIA v. SUSANNA M'KEE.

SUSANNA M'KEE, a widow, was tried for the murder of her bastard child. The infant was found dead in the *Monongahela* river, on the 15th *August* last, with a stone to it, its head bruised, and marks of violence. This woman was suspected and examined: at first she denied, but afterwards confessed, having had a child.— She said she had buried her child, it having been dead born. Afterwards owned she had taken it up, and thrown it in the river. One witness for the prisoner (a man suspected as the father of her child) proved, that, three months before its birth, she applied to him, when he was going out of the neighbourhood, to enquire for a nurse, and send to her, as she did not want the child to be in the neighbourhood; and that she afterwards sent to know, whether he had found one. He never enquired.

Brackenridge and *Young* for the prisoner, read act of *September*, 1786. 2 *Hawk.* 438. 2 *Hale*, 289.

PRESIDENT. The 8th section of "the act for the advancement of justice, and more certain administration thereof," passed in 1718, declares, that if any woman delivered of a bastard child "endeavour privately, by drowning or secret burying thereof, or any other way, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not; except such

1791.

31st May,
1718.
1 St. L. 135.

1791. mother can prove by one witness, that such child was
 born dead, she shall suffer death, as in the case of murder:" thus making concealment of its death evidence of such dead child being born alive, and killed by its mother. This law is borrowed from *England*; and there, as it favoured of severity, it became usual, in trials for this offence, to require some sort of presumptive evidence, that the child was born alive, before the other constrained presumption, that the child whose death was concealed, was therefore killed by the mother, was admitted to convict her on this statute. And this practice of the *English* courts was expressly established as the law of *Pennsylvania*, by "the act for amending," and "the act to reform the penal laws of this state," passed in 1786, and in 1790, which declared that this concealment shall not be sufficient evidence, to convict the mother, without probable presumptive proof that the child was born alive.

To support this indictment, therefore, there must be, first, positive evidence of the concealment, then probable evidence of the birth alive. Or, if there be no evidence of concealment, it may be left to the jury on the circumstances, if they warrant it, to say, whether she murdered the child, by wounds, &c. or not.

Concealment, as the negative of publication, admits only of such proof, as other negatives. But here special acts of concealment, as private burying, or drowning are pointed out by the law, and proved by the testimony. But, as concealment of death may be occasioned by accident, without any design, unless there be a concealment of pregnancy, labour, &c. or some other circumstances of concealment, there being no person present at the birth is not sufficient, to convict the mother.

Concealment is sufficiently proved. The circumstance of the nurse, three months before, and at a distance from the neighbourhood, considered as countervailing it, seems very weak. There is no discovery or notice to the neighbours; no call on any of them. She certainly intended to conceal. That intent the law views in a capital light; and reasonable suspicion will not view it as innocent.

Presumptive evidence of the birth alive is sufficient. Want of hair, nails, &c. or other circumstances of a

1791.
Kel. 32.

4 *Comm.* 198.

15 *Sept.* 1786
 § 9.

5 *April*, 1790
 § 6.

2 *St. L.* 804.

2 *Hale, P. C.*
 289.

2 *Hale*, 289.

2 *Harw.* 438

Kel. 32—3.

premature birth, must be evidence in favour of the prisoner. Circumstances of maturity, marks of violence, &c. are evidence against her. You will consider, whether the marks of violence were inflicted of purpose on the child, or by accident to the dead body in the river. The presumption ought to be such, as, together with the strength of the temptation, and the circumstances of the mind and conduct of the prisoner, will induce you to believe, that the child was born alive, and killed, by the act, procurement, or wilful neglect of the mother whose case is now before you. 1791.

The jury found a verdict, not guilty.

NOTE—The 8th section of “the act for the advancement of justice,” &c. on which this indictment was founded, is copied from the *English* statute, 21 *Ja.* 1. c. 27. At a gaol delivery for *Newgate*, 16 *Car.* 2, *Anne Davis* was tried on this statute, for the murder of her bastard child, and the indictment not being special, as the statute is, for concealing the death; but “that she brought forth a living male child, which, being born alive, was a bastard,” and then stating, in the ordinary form, that she murdered it, concluded “against the peace,” &c. without saying against the form of the statute; the judges doubted whether the indictment ought not to have been special. Examining the precedents they found a special indictment in 2 *Car.* 1, but all after 4, 5, and 6 *Car.* 1, framed as that before them. And they were told, that this form was adopted, by the advice of the judges at that time; the statute making the mother’s concealment of the death of her bastard child, punishable as murder, which was an offence at common law. This enquiry and information satisfying the court, they proceeded on the indictment. And this form of indictment for murdering a bastard child, comprehending also an assertion of secret birth and killing, continued to be considered, as an established specific indictment for concealing the death of a bastard child, the offence declared by the statute to be punishable as murder. If the indictment was in this form, and evidence given of concealment, the mother must prove by one witness that the child was born dead. If the indictment state not that the child was a bastard and born, alive, she is not put to this proof. The same form was adopted in *Pennsylvania*, as a specific indictment for the same offence, under our act of 1713; and

1791. continued to be so under our act of 1786 and of 1790, which, besides concealment of death, required additional presumptive evidence of birth alive.
- 22 Apr. 1794 In 1794, the assembly of *Pennsylvania*, by "the act for
3 St. L. 599. the better prevention of crimes, and for abolishing the punishment of death in certain cases," distinguished murder into two degrees, and reserving the punishment of death for murder in the first degree, changed the punishment of murder in the second degree into confinement for a period not less than five years. And, with respect to the offence of concealing the death of a bastard child, formerly punished, as murder, with death, the 17th section of this act declares, that if any woman endeavour privately to conceal the death of her bastard child, so that it may not come to light whether it was born dead or alive, or whether it was murdered or not, she shall be punished by confinement for a period not exceeding five years, or by fine and imprisonment, at the discretion of the court; and further provides, that if, together with this offence, the indictment charge the woman with the murder of her bastard child, the jury may acquit or convict her of both offences or either. The 18 section then declares, that the concealment of the death of any such child shall not be conclusive evidence, to convict the mother of the murder of her child, "unless the circumstances attending it be such, as shall satisfy the mind of the jury, that she did wilfully and maliciously destroy and take away the life of such child."
- 606, § 2, 4.
- 606, § 17.
- § 18.
- 2 St. L. 804. "The acts of 1786 and 1790," declared, that concealment of the death was not sufficient to convict, without presumptive proof of birth alive. And this act of 1794,
3 St. L. 599, renders evidence both of birth alive and concealment of
606. death, insufficient to convict; unless there be circumstances of wilful murder. This is an important alteration of the
1 St. L. 135. act of 1718, and in fact, seems altogether to destroy the force of the 8th section of that law, except as to the form of the indictment under it. For, though that section had never existed, if a mother had been indicted for the murder of her bastard child, and proof had been made, that she concealed its death, and probable presumptive proof, that the child was born alive, and if the circumstances satisfied the mind of the jury, that she did wilfully and maliciously take away the life of such child (and on an indictment for murder at common law, all this evidence is admissible) the jury must have convicted her of murder. If, therefore, on an indictment at common law for murder, before the

act of 1718, such evidence as the act of 1794 requires had been sufficient to convict, the duty of the jury to convict, on an indictment for the murder of a bastard child, seems now to arise, not out of the 8th section of the act of 1718, but out of the common law; and a mother, indicted for the murder of her bastard child, seems to be in a situation neither worse nor better, when indicted under this section of the act of 1718, or for murder at common law. If the 8th section of the act of 1718, restrained as it is by the 18th section of the act of 1794, answer no other purpose than the common law, its use ceases, and it might be repealed. If, therefore, it had been the intention of the act of 1794, to make concealing the birth and death of a bastard child a specific offence, distinct from murder, and not also leave it, as it was before, a component part of the offence declared by the act of 1718, and stated in the indictment as murder, the plain way to accomplish this intention was, first, to repeal the 8th section of the act of 1718, and then declare the offence and punishment of a mother concealing the birth and death of her bastard child. But, instead of this, the act of 1794 first changes the punishment of a mother concealing the birth and death of her bastard child (as it does of murder in the second degree), from death to confinement; then qualifies the 8th section of the act of 1718, by declaring certain circumstances necessary to make ^{3 St. L. 606,} ^{§ 19.} concealment conclusive evidence of murder, and repeals no law not repugnant to, or supplied by itself. So qualified, the 8th section of the act of 1718 is recognized by the act of 1794; and the established form of indictment under the act of 1718 and the subsequent acts is also recognized, and ^{3 St. L. 606,} ^{§ 17.} may be accompanied with a special count, for concealing the birth and death.

Whether, since the act of 1794, there be much use in retaining the form of indictment established under the act of 1718, may, as I have stated, appear doubtful; and it may seem, that an indictment for murder at common law may answer all the purposes of this form of indictment on this statute. But as the act of 1794 seems to sanction this form of indictment; and there may be conceived some force in the words "one witness," in the act of 1718, and in the words, "conclusive evidence," in the act of 1794; it seems advisable, to retain this form of indictment against a mother, for the murder of her bastard child, as a ^{2 Hale, P. C.} notice, to prepare to encounter the evidence of conceal- ^{288—9.} ment, by the proof of one witness, that the child was born dead.

1791.

There may, therefore, now be three counts, in an indictment founded on the death of a bastard child:

1. A count at common law, for the murder of a child.
2. A count, in the form settled under the stat. 21 *Ja.* 1. and the 8th section of our act of 1718, for the murder of a *bastard* child, by its *mother*; and,
3. A count for the *concealment* of the birth and death of a bastard child by *its mother*, specially framed, on the 17th section of the act of 1794.

I do not know that the first is *necessary*, as the second is so framed, as to accomplish the same purpose. On the second count, as other than a count at common law, there must be proved, *First*, by the act of 1718, concealment of the birth and death; *Second*, by the act of 1790, probable presumptive proof of the birth alive; and *Thirdly*, by the act of 1794, circumstances to satisfy the mind of the jury, that the mother wilfully took away the life of her child; and then, unless she can destroy the effect of this evidence, *by the proof of one witness, or circumstances equivalent,* she will be convicted of murder. Or, under this count, as a count at common law, if there be no concealment proved, it may be left to the jury on the circumstances, as at common law, to enquire whether she murdered it or not. Under the third count, there is nothing more to be proved, but concealment of the birth and the death, as stated in the 17th section of the act of 1794; and, on conviction on this count, judgment is given, as prescribed by that section.

2 Hale, 289.

I think, therefore, indictments against a mother, on the concealment of the death of her bastard child, ought now to contain, at least, those two last counts; the count for the murder of her bastard child, as settled under the stat. 21 *Ja.* 1. and our act of 1718; and (for even strong circumstances of actual killing may not satisfy the jury), a count framed on the words of the 17th section of the act of 1794, for the concealment of the birth and death of her bastard child.

But if from strong circumstances of wilful and malicious taking away of life, no count of this last kind should be drawn up, and the preceeding count, for the murder of a bastard child, as settled under the statute 21 *Ja.* 1. and our act of 1718, should stand alone in the indictment; and the circumstances of wilful killing should not satisfy the mind of the jury, and they should not find the murder, but find specially a concealment of the birth and death in the terms, of the 17th section of the act of 1794; could judgment

be given according to that section, for confinement for not more than five years?

1791.

Concealment of the death of a bastard child was not first declared an offence, by the act of 1794; but at the time of passing that act, and at all times before, since the act of 1718, was an offence.

The act of 1794 does not repeal the 8th section of the act of 1718, but changes the punishment (of this as of other offences) and adds a new qualification. Concealment, with other circumstances, may yet be evidence of murder; murder, like concealment without those circumstances, may yet be punished by confinement for five years; and the act of 1794 still supposes the form of indictment under the act of 1718 to be used. Under that form, concealment of death is an essential part of the evidence; for that form was, in fact, considered as a specific indictment for the concealment of the birth and death of a bastard child; and was notice to the mother to prepare to meet evidence of such concealment, and contained words equivalent to concealment of the birth and death.

The punishment is changed not from a less to a greater, but from a greater to a less; and there was more reason for a special notice in the indictment, that evidence of concealment was to be given, when the punishment of it was death, than now, when the punishment of it is but confinement for five years. If on an indictment in this form, the jury before the act of 1786, had found specially the concealment, in the words of the act of 1718 & of 1794, judgment of death would have been given; if so found now, on this form of indictment settled for concealment, when the punishment of other murders is changed to confinement, may not judgment of confinement be given?

2 Hale, 129,
—90.

The offence, which is found by such verdict, and which, by statute 21 *Ja.* 1, and our act of 1718, was punishable by death, and, by our act of 1794, punishable by confinement, is a mother's concealment of the birth and death of her bastard child. Under the statute 21 *Ja.* 1, and our act of 1718, this was the settled form of indictment for this offence. When our act of 1786 and 1790 added another circumstance, probability of birth alive, it remained the form of indictment for concealment so qualified. And when the act of 1794 added further circumstances of wilful taking away of life, it yet remains a form of indictment for concealment so qualified. So that now, it is a form of indictment for a mother's concealment (which of itself was for-

1791.

merly capital) of the birth and death, 1, of her *bastard* child; 2, of her bastard child *probably born alive*; and 3, of her bastard child probably born alive and *wilfully destroyed*.

See 2 Hawk,
622-627 *and*
cases there
cited.

Lesser's case,
Cro. Ja. 497.
See Joyner's
case, Kel. 29.
Holmes's case,
Cro. Car. 376.
1 Hawk. 263

There are offences compounded of an inferior offence and something more; as petit treason, burglary, murder, &c. and, though in such cases, on an indictment for the less offence, the defendant cannot be convicted of the greater; on a verdict for the greater, he may be convicted of the less, and receive sentence accordingly. On an indictment for larceny, the verdict was a playing with false dice, and judgment was given for the misdemeanor. On an indictment of a single count for an assault and battery, the defendant may be convicted of the assault only. Homicide by misadventure, is an unlawful killing by accident. Manslaughter is an unlawful voluntary killing without malice. Murder is an unlawful killing with malice. On an indictment for murder, the defendant may be convicted of manslaughter, or of homicide by misadventure, &c. This form of indictment is for a murder, consisting of concealment of death, and other circumstances; may not the defendant be convicted of the concealment without the other circumstances, and receive sentence accordingly?

This may be thought to be going a great way to support such proceeding; and no doubt the best way is to annex, to this form of indictment, a special count for concealment, in the words of the 17th section of the act of 1794. But where, because the concealment was accompanied with strong circumstances of wilful taking away of life, this has not been done; as I am averse to the obstruction or delay of justice on mere matters of form, where there is not a manifest violation of the plain rules of law or natural justice; on a special finding, in the words of the 17th section of the act of 1794, on an indictment under the 8th section of the act of 1718, where the mother has had a full opportunity of defence, on the merits of her case, I am not convinced that judgment ought to be arrested.—Why may not judgment be given under the 17th section of the act of 1794?

At January sessions 1794, a Negroe woman was tried in *Washington*, on an indictment for the murder of her bastard child. The circumstances were very strong, and might reasonably have been thought sufficient, to satisfy the mind of the jury, that she did wilfully and maliciously take away the life of the child. However, the jury did not find the murder, but found the concealment of the birth and of the death. The court gave judgment of confinement for five years.

See also M^r
Birnie's case,
post.

WASHINGTON COUNTY,

September Term, 1791.

PENNSYLVANIA, v. CHARLES SIMMS.

TWO bonds, each in the penalty of 478*l.* and for the payment of 239*l.* were given by *Charles Simms* to *Alexander Ross* on 24th August, 1775; one of them payable in two years, the other in three, from the date of the bonds. The property of *Alexander Ross* being confiscated by the "act for the attainder of divers traitors," &c. the agents for confiscated property in *Westmoreland* obtained these bonds from the persons in whose custody they were left, by *A. Ross*, and issued two foreign attachments, founded on them, by which land of the defendants in the county of *Washington* was attached. Special bail was entered in both actions, and payment, with leave to give the special matter in evidence, pleaded; and now, by consent, both were tried by the same jury.

1791.

6 March,

1778.

1 St. L. 750.

Brackenridge, Ross, and Woods for defendant, produced a long statement of facts admitted by Mr. *Ormsby* and Mr. *Galbraith*, agents for confiscated property: from many of which it appeared, that it had been intended, that this cause should be argued, on the ground, that *C. Simms* and *A. Ross*, having both lived at *Pittsburgh* under the government of *Virginia*, and as citizens of *Virginia*, and never citizens of *Pennsylvania*, this debt was not forfeitable nor attachable by a law of *Pennsylvania*. But the points admitted, on which the case was argued, were that the bonds in question were given for land in *Washington* county, sold to *Simms* in 1775, part of a grant by the *Six Nation Indians* to *George Croghan*, who had no other title to it; that this land sold to *Simms* by *Ross*, had been sold by *Croghan* to *Ross*, who had no other title to it; that the grant from the *Six Nations* to *Croghan* expressed, that it was to have no operation within the limits of *Pennsylvania*; that an act of assembly of the state of *Virginia* (which had exercised a disputed jurisdiction in *Washington* county) passed in 1779,

1791. made void all *Indian* grants; and that *Simms* derived no right or benefit by his purchase from *Ross*.

2 *Burr.* 1012.

1 *Bla.* 445.

1 *Str.* 674.

1 *Eq. ca.* 84

—5

Dall. 17, 28,

257.

They then read the *Virginia* act of assembly above mentioned, the conveyances from *Croghan*, &c. and relied on want of consideration, and an assignee standing in no better situation than the obligee.

Bradford for the State. At the time of the purchase from *Ross*, legal titles were not common. Many purchased mere improvements, and took their chance of title. Here there was no fraud. If the land had become of great value, *Ross* could have claimed no more, therefore *Simms* ought to pay no less.

PRESIDENT suggested, that *Simms*, disclaiming all right to these lands under this title, and refusing to pay the consideration money, ought, at least, to release this title to the state. Mr. *Simms* immediately offered to do this; but Mr. *Bradford* thought it not worth accepting.

PRESIDENT directed the jury, that, if they thought it the meaning of the parties to buy and sell a legal title, they should find for the defendant. But if it was their meaning to buy and sell only a claim or occupancy, which might be beneficial or otherwise, they should find for the plaintiff. This is not the case of an assignee for a price paid for the bond, but like the case of an heir or executor of a dead man, who must take all the property of the deceased with all its incumbrances. Were it the case of an assignee for full value, our act of assembly puts him on the same ground with the obligee. Were it otherwise, the state, having sold the land to others, or if to the defendant, for another consideration (the compact between the two states is a consideration*) ought not to require payment twice for the same property. *Pennsylvania* therefore stands in a worse situation, than any other assignee; and *Simms* has received no consideration for these bonds. The risk of a rise or a fall of the value of the land, is out of the question either way.

There was a verdict and judgment for the defendant.

* It seems Mr. *Simms*, despairing of holding this land by the *Indian* grant, had surveyed some of it on a *Virginia* treasury warrant, and so held it under the compact between the states: and the land attached was the same land.

WESTMORELAND COUNTY.

October Term, 1791.

Lessee of GEORGE LATTIMORE v. WM. MARTIN.

THIS case had been referred by rule of court to five persons, on whose report, or that of a majority, judgment was to be entered. The report now offered shewed, that four of the referees, and both parties, met at the time and place agreed on, and that the parties then agreed to substitute another in the room of the absent referee named in the rule. This agreement was then put in writing at the foot of the copy of the rule, signed by the parties, and now produced. The report was signed by all the referees who heard the case; by the four present of the referees named in the rule, and the referee substituted in room of the absent one. 1791.

Woods for defendant, moved to set aside the report, on the ground that not having been made by those only, to whom it was referred, by rule of court, but by four of them and another, whose opinion might have influenced the opinions of the four; it did not pursue the submission, and so could not be supported.

Ross for plaintiff. The consent of the parties takes away error, is in writing, and will be part of the record. *Dall* 314. *2 Burr.* 701. *2 Bat.* 225. The number of arbitrators is sufficient without the name substituted. This is not an award by act of assembly but at common law.

PRESIDENT. It is not alledged, that the absent referee had not notice, nor that there was any fraud or misbehaviour in the parties or referees; neither is this a motion for an attachment for non-performance, but to set aside an award, in which all is fair on both sides; nor have the arbitrators exceeded their power, or not pursued the submission; for the submission and their power is from the act of the parties, not of the court. The material point in all these cases seems to be the consent of the parties. The rule of court seems to be rather matter of form, to secure a fair and effectual execution of the agreement of the parties. The consent to substi-

1791.



tute the referee, in room of the one absent is in writing, annexed to the copy of the rule, in the presence of the referees, who were both judges and jury; is recited in the report, and will appear on the record. There is a majority without the absent referee, and (he having notice) that is enough. The award would be good if the new name were not there. Shall its being there *by the consent of the parties* make it bad. This consent ought to be construed as inserted in the rule; for, in equity, that is considered as done, which ought to have been done. What would have been the defendant's answer, if this question had been made at the time? The defendant ought not to be permitted to mislead the plaintiff, by a reference, and now take advantage of his own deceit; and, having had one chance, at pleasure lay it aside, when he finds it against him, to recur to another.

Chubb v.
Roper, 1 Rep.
6ba. 140.

NOTE.—In an arbitration, the award was, that a lease should be surrendered, and, (with consent of the parties) that certain *other* persons should settle the value of the improvements; the plaintiff, having surrendered the lease, brought his bill for the value of the improvements, ascertained by the other persons. And, though it was objected, that this was extra-judicial, the court of chancery decreed performance; considering this as part of the principal award, which the other party had executed. The court of King's Bench refused an attachment for non-performance of an award made by an arbitrator substituted by the real parties (though not the parties on the record) instead of the arbitrator named in the rule. But in the case of lessee of *Lattimore v. Martin*, no application for an attachment or judgment on the report was made; for Mr. *Woods* having made some objection on the merits, and a mistake of the referees; it was agreed to refer it back to the same persons, who had made the report.

Owen v. Hurd
2 T. Rep.
643.—See
3 T. Rep. 392

ALLEGHENY COUNTY.

December Term, 1791.

JAMES WRIGHT v. JAMES KERR and wife.

THIS was an action of trespass *quare clausam fregit*, 1791.
 against a husband and wife, jointly, for taking
 one hundred bushels of corn, &c.

Ross, for the defendants, objected to any testimony against the husband; 1, because the writ being against the two, as husband and wife, is to be considered in the usual way of joining the husband with the wife, for forms sake, and for his interest; and 2, because a wife committing a trespass in the presence of her husband, is not answerable, acting by compulsion.

Brackenridge and *Carson*, for the plaintiff: Trespass *White v. Eldridge*, 1 *Ld. Ray*. 443, 1 *Bac. abr.* 307.
 lies against husband and wife, for a joint trespass by both.

PRESIDENT. This is not an action against husband and wife, for a trespass by the wife, but for a joint trespass by both. Though the husband's presence should excuse the wife, the wife's presence will not excuse the husband. The evidence is proper. If the exception be intended against the action, there is another way to bring it forward, and give it effect, if it can have any.

Lessee of FERGUSON v. SMALLMAN.

MAJOR *Ferguson*, purchased at Sheriff's sale a tract of land, which was the property of Major *Smallman*, and sold on judgments against him. *Smallman* would not give up possession, and an ejectment was brought to this term.

A copy of a declaration with a demise, dated after the 4th of *November* last, was given to the Sheriff, with a notice, to be served on *Smallman*. Another copy was also delivered with a demise dated before that day.

1791. Major *Ferguson* was killed on that day, in General *St. Clair's* engagement with the *Indians*. Only one cause appeared on the docket.

Carson, for the defendant, producing the copy which stated the demise as dated after the death of *Ferguson*, moved to quash the proceedings, on that ground.

Brackenridge, for the plaintiff, produced a declaration filed in the office, a copy of which had been served by the sheriff, stating the demise before the death of Major *Ferguson*; and urged—1. Here is a record, with a demise in the life time of the lessor, of which a copy has been served on the defendant. The court will not look farther in favour of an objection obstructive of justice.—2. *Smallman* is estopped by his confession of lease, entry, &c. from saying any thing against the demise; this confession is a condition of his being admitted defendant.—3. The death of the lessor does not abate an ejectment, which is the lessee's action, to recover his term.—4. An ejectment may be brought on the demise of a person dead, on a lease made in his life time, and not expired; this being only descriptive of the title questioned.

PRESIDENT. Let defendant take nothing by his motion.

WESTMORELAND COUNTY.

December Term, 1791.

PENNSYLVANIA, v. WILLIAM ROBISON and
ANDREW ROBISON.

1791. AN indictment for a forcible entry and detainer of lands of *Ralph Cherry* was found and tried in the Quarter Sessions.

Brackenridge and *Ross*, for the defendant, objected to *Cherry* the prosecutor as an incompetent witness to prove the possession. *Ex necessitate rei*, a prosecutor is admit-

ted to prove the force; but possession is a notorious fact, which may be proved by other witnesses.

1791.

Galbraith, Woods, and Young, for the prosecutor, declined taking up time to answer the objection, and called other witnesses to prove the possession.

The counsel for the defendants made three points.—

1. Was *Cherry* in possession?
2. Was *Robison's* entry forcible? and
3. Was it within three years before the indictment.

1. The same possession, which is protected from a forcible entry, would support an ejectment. A possession of twenty years bars the one, of three years, the other. One may have the possession; another, the right of possession; a third, the right. Possession is enough against a wrong doer. In the case of the *State, v. Hughes*, in a court of Oyer and Terminer in this county, an indictment for a forcible entry on the possession of *Powel*, it was proved that *Hughes*, the defendant, had built his cabin within an hundred yards from *Powel's*. The Chief Justice held, that no forcible entry could be made on *wood land*; and *Hughes* was acquitted. Such a possession as *Cherry* had would not have entitled him to a recovery in ejectment; and it is not such as a forcible entry could be committed on.

2. and 3. There was no force in the entry; and, if there was, *William Robison* has since been more than three years in possession; and, on every ground, there must be a verdict of acquittal.

PRESIDENT. The possession may be in one, the right ^{2 Comm. 195} of possession in another, and the right in a third. One —9. who has entered forcibly may have the possession, without either the right, or the right of possession, and if he die, and transmit the possession to his heir, he transmits more than he had, for the new possessor has also the right of possession, though without the right. Or, in another way, one, who has a patent for land, has the right; his lessee has the right of possession; and one, who illegally ousts him, has the possession. In ejectment, the right, and the right of possession come in question. In an indictment for a forcible entry, neither comes in question, but the possession only and the force. If one having the right, or right of possession, may support an ejectment, it follows not, that he may enter by

1791.

force, or that no less possession than a rightful one, or such as would support an ejectment, is protected from a forcible entry. For, whatever right, either of property or possession, the man who makes the entry may have, he must not commit a crime in exerting it; and he commits a crime, punishable by indictment, if he enter with force, on a person having no right, not even of possession; and in resentment of the crime, his right, whatever it may be, though both of property and possession, is set aside unregarded by the law, and the person forcibly dispossessed, though having neither the right, nor the right of possession, is taken under the protection of the law, and restored to that possession, of which he was forcibly deprived. This is done even against a man with both the right and the right of possession, who, if he had entered peaceably, or demanded it by action, would have attained the possession, and been secured in it.

A man having both the right, and the right of possession, is barred in the possessory action of ejectment, unless he can prove a possession within twenty years. And a man who has not even the right of possession, in any sense, and has obtained possession by violence, against all right, will not be dispossessed by indictment, if he has been three years in peaceable possession: for three years is a bar to restitution in this way.

But the comparison of forcible entry, with ejectment, neither elucidates the subject, nor supports the cause of the defendants. For though possession be of so light a nature, that, when it comes in competition with title, in a legal discussion in ejectment, it will not stand; it may be a sufficient occupancy, exercise of ownership, use, or enjoyment, which will be protected against force. The interruption of this possession by violence is made a crime, to be redressed by indictment. And any argument from possession being sufficient against a wrong doer, is against the defendants. Very light evidence of possession, as a barrel of beer left in a cellar, has been sufficient in ejectment, to set aside proceedings, as on a vacant tenement. And yet having cattle on the land has been held not a sufficient possession to be protected against a forcible entry, by one having the right. But the ground of this seems to be, that the crime lies in the force or fear of some human being. Though im-

Dent v. Sa.
vage. 2 Str.
1064.

2 *Burns*, 179.
2 *Bat. Abr.*
558.

provement be no evidence of *title*, and has therefore failed against title, in ejectment, it may be evidence of *possession*, to be protected in a forcible entry. It is not the degree or quantity of possession, that constitutes the right of possession, but the manner, in which the possession was obtained ; and a possessor, without the right of possession, may be as completely possessed, as one who unites in himself possession, right of possession, and right, and is equally protected against a forcible entry ; though he would not recover, or would be turned out in an ejectment.

1791.

There must be some evidence of possession. But I cannot think, that the case of the *State v. Hughes*, has been fully stated. A man cannot stand on every part of his land ; he cannot build houses, and settle tenants on every acre of it ; he cannot plough every corner of it, nor make a fence round the whole. Binding the inhabitants of this country to rules so strict, and protecting, from forcible entries, only lands so possessed, would be very inconvenient, and would, in a great measure, if not entirely, elude the law ; especially in those cases, for which chiefly the laws were made, of poor people, least able to circumscribe their survey on a legal title, to build, plough, or fence. Therefore, if a man, in any manner, circumscribe for himself a reasonable possession, within such bounds, as are usually allowed ; sit down, on one part of it ; build, in such manner as is convenient ;—plough and fence, as may suit his interest, inclination, and ability ; and use the residue of his known and reasonable claim, as other men of like condition use their lands ; he will be considered as in such possession of the whole, that a forcible entry into any one part will be punished by these statutes.

2. As to the force in the entry, &c. there must be, at least, such acts of violence, or such threats, menaces, signs, or gestures, as may give ground to apprehend personal injury or danger, in standing in defence of the possession.

3. I cannot see how, on the plea of not guilty, you should acquit the defendants, because the forcible entry has been (if it have been) followed by three years peaceable possession. If the entry was forcible it was a crime ;

1791.

and you must say whether the defendants are guilty or not. Three years peaceable possession bars the remedy of restitution; but does it justify the offence? If the defendants would use this, to prevent the award of restitution, it must come before the court in pleading or in some such way, as that it may be put on the record, and not exist only in the evidence.*

* The place in dispute was a remarkable spot, known by the name of "*The Indian Fort*," of extraordinary rich ground, about forty perches from the cabin built by the first settler, (from whom *Cherry* derived his claim), the trees on it were deadened by him at his first settlement, and ever since known to be within his claim.

FAYETTE COUNTY,

December Term, 1791.

PENNSYLVANIA v. JOHN LOVEL, and RACHEL his wife, *alias* RACHEL WHITKEN.

AN indictment for larceny, in stealing a silver tea-tongs, &c. was found, at this Sessions against *John Lovel* and *Rachel* his wife, *alias Rachel Whitken*. They pleaded separately. The man was first tried and acquitted. Then on the trial of the woman.

Ross, assigned counsel for them, urged, 1. There is no crime.

2. If any, it amounts not to larceny, but a misdemeanor only, in receiving stolen goods.

3. Being joined with her husband, his presence amounts to coercion, and she is excused.

Galbraith, for the State, 1. There is evidence of a crime, and

2. Of the crime laid in the indictment. She is not, in fact, his wife, but only lived with him.

PRESIDENT. Doubtless, a crime is proved. Larceny seems to be proved. But if you think this crime not proved, you ought to acquit on this indictment.

As to the third point, it is not before you. Indictments are in their nature, joint and several, as the case may be. Though this indictment be against both, they have been tried separately; and the parts relating to the one have not been read over against the other. It is to you a separate indictment against this woman. The presumption of the man's presence, from his being joined in the indictment, is contradicted by his acquittal. You have no evidence whether she has a husband, or whether he was present, or not. You have only to decide on the two first points. The difficulty, if there be any, in the third point will lie with us. For, if you should find this woman guilty, a question may be made to us, whether sentence can be passed on her for a larceny charged on her jointly with a man stated to be her husband; or, if not on the conviction of both, whether the acquittal of this man will justify such sentence.

1791.

NOTE.—The point seems settled that judgment may be given on such conviction: However in this case there was no occasion for any decision of ours, as the woman was acquitted.

9 Rep. 71, 11.
Rep. 61—2.
1 Hale P. C.
46 Wood's
Inst. 345.

WASHINGTON COUNTY,

January Term, 1792.

ALEXANDER FULTON v. WILLIAM IRWIN.

ON a motion to set aside a *testatum ca. sa.* to Franklin county, for want of a preceding *ca. sa.* to this county, the court did not set it aside.* But on motion they ordered the plaintiff to account for the full value

1792.

* All the decided cases have given way to the exception, *Dal.* 333. while, at the same time, they have held it completely answered by the production of an original, notoriously taken out, after the motion has been made. Why not as well

2 Bla. Rep.
694.
2 Salk. 590.
3 T. Rep. 383.

1792.

of notes, the property of the defendant, taken in execution, and bought by the plaintiff at sheriff's sale, for a less sum than was due on the notes.†

overlook the exception at once, and save the expence and delay? In this case the prothonotary who signed the *testatum* had gone out of office, before the motion to set it aside was made.

*Ca. temp. Ld.
Hardw. 53.
Dig. of ad-
judged cases,
594.*

† I know not what has generally been the practice in *Pennsylvania* as to attaching or seizing debts. In *England*, it was held that bank notes were not seizable.

ANONYMOUS.

ROSS moved for leave to enter judgment on a warrant of attorney to confess judgment, for the penalty of a bond exceeding 10*l.* the real debt being under 10*l.* His object was to have it ascertained before hand, who should pay the costs.

The court would not interfere; and he did not enter the judgment.

Dall. 308.

NOTE.—I have heard different opinions on this subject; and if the case of *Cooper v. Coats* was the case of a bond with a penalty, there seems to be a decision against giving costs to the plaintiff. Yet I think there are strong reasons for supposing, that judgment may be entered in the court of Common Pleas on such a warrant, where the penalty exceeds, though the real debt is within, the jurisdiction of a justice of the peace; and such judgment will carry the costs of course. So also if the judgment were by default. The judgment appears for a sum above the jurisdiction of a justice. Till application for relief, from the penalty, the court cannot see that this is not the real debt. They will not relieve but on equitable terms, as payment of costs, &c. The penalty is legally the debt after default; and stipulating for a penalty admits prosecution for it, and of course promises the payment of all costs necessary for its prosecution. The creditor ought to choose his jurisdiction; and a delinquent ought to have no favour, that would injure his creditor.

But if the judgment were on a verdict, it would be only for the sum due.

ANONYMOUS.

BRACKENRIDGE asked the direction of the court to exhibit a judgment for a penalty, in evidence to a jury of enquiry, whether land will extend or not. 1792.

PRESIDENT. This seems a strange motion. The seizure of land seems somewhat analogous to a payment or tender. The court will not suffer a plaintiff to receive more on a judgment, than is really due. And the question before the jury is, in what time the profits of the land will discharge the debt really due. But we give no direction either way.

ALLEGHENY COUNTY,

March Term, 1792.

PENNSYLVANIA v. MARGARET M'GILL and
WILLIAM BOGGS.

INDICTMENT for a misdemeanor. *Boggs* persuaded *M'Gill* to steal, and deliver to him, a conveyance for 100 acres of land executed by *Henry Shaver* to his son and daughter. This land was part of a larger tract, of which *Shaver* had been possessed, under a location or a *Virginia* certificate. He intended this hundred acres as a provision for his two children; and having sold the rest to *Boggs*, he conveyed the location or certificate to him, that he might take a patent for the whole in his name, and took an article or bond on *Boggs*, to convey this hundred acres to his children, after he obtained the patent for the whole. They were convicted.

The court suggested, that it might be useful, if *Boggs* having the title to this land, should before sentence, execute a conveyance to the son and daughter of *Shaver*. He did so—and judgment was given.

JAMES FARNESLY v. PATRICK MURPHY.

1792.

THIS was an action of *indebitatus assumpsit* for money had and received. In the year 1785, *Patrick Murphy* bought from *James Farnesly*, an out-lot, improved and occupied by *Farnesly*, of twenty-one acres, near the town of *Pittsburgh*; for which he agreed to pay 40s. per acre, if at a certain time thereafter, which was then fixed by the parties, the proprietaries should not have granted a patent or deed for it, to any other person. No patent was granted at the time fixed, nor some time after, when *Murphy* himself was in *Philadelphia*, and might, as he undertook to do, have obtained a patent, in his own name. But *Murphy* procured one *De Byerly* to lend his name, to take out a patent for the land, and convey to him. *Murphy* paid the purchase money and fees, and gave *De Byerly* a bottle of wine, for his service. When *Murphy* returned home, he told *Farnesly*, that the land had been granted to another, from whom he was obliged to purchase, and therefore he could not pay him. It was the custom of the proprietaries, in giving titles in the manor of *Pittsburgh*, to prefer settlers to any other; and they have even refused to grant deeds to some, for land or lots, which others had improved; reserving them for the improvers, when they should apply. If *Farnesly* had not sold, he would, from the usual indulgence of the proprietaries, have got a patent for this land, in preference to any other; and as *Murphy* had bought from him, he would have had the same preference. Land, such as this, and near it, has been sold for 10l. per acre.

Brackenridge and *Young*, for the defendant, faintly controverted the fraud, and insisted, that the plaintiff could not recover by *assumpsit* for money had and received, on such a case as this; and for this cited *Nightingale v. Devisme*.

Ross and *Woods*, for the plaintiff, read and relied on what is said by *Lord Mansfield* in *Moses and McFarlane*, and in *Hawkes v. Saunders*.

PRESIDENT. There are three questions.—1. Has the plaintiff any just demand, against the defendant?
2. Has he brought it forward in a proper shape?

3. And, if he has, how much ought he to recover?

1792,

1. The merits are clear for the plaintiff. He sold only his claim and possession, not the title; this the defendant undertook to procure himself from the proprietary. The defendant got from the plaintiff all that was promised him; all that he then expected; all for which he was to pay to the plaintiff 42*l.* and this he ought to have paid.

2. The objection to the form of the action is better founded, and strong. But courts have been daily enlarging the liberality of this action, and leaning more against nonsuiting a plaintiff, with justice on his side. The cases nearest the present, in which this form of action has been held to lie; are *Clarke v. Shee*, for notes, and *Longchamps v. Denny*, for a masquerade ticket. And if you presume, that the defendant has sold the land, and received the worth of it, your presumption will be something like that in the case of the masquerade ticket. There is another presumption, which may be made, to support this action, from the defendant's having received the profits of the plaintiff's possession and improvement. The best form of action surely has not been chosen; but the objection is unreasonably extended, in saying, that the money must not only have been received by the defendant, but paid by the plaintiff. It is clearly enough if the defendant have received money from the plaintiff's property, or for the plaintiff's use, from any body. The objection is not exclusively directed to us, by a motion for a nonsuit; but to you also on a general verdict. We shall not direct a nonsuit.

2 Burr. 1007.
3 Burr. 1243.
Doug. 628—
651.
H Bla. 641.
Cowp. 289—
94.
Cowp. 197.
Lofft. 756.
Doug. 132.

3. As to the quantity of damages. Some cases, where there is a just or reasonable cause for retaining the money, till there has been a legal investigation, might justify a jury in refusing even interest to a plaintiff. In some cases damages ought to be measured by the loss of the plaintiff; in some, perhaps, by the gain of the defendant, proceeding from the unjust detention. And in some cases, it is proper to give exemplary damages. Indeed these remarks which would have applied to a special *assumpsit*, are less proper in the present form of action, which goes only for the money supposed to have been actually received. But this case is highly fraudulent.

2 Burr. 1009;
Cowp. 290—
4.
See Porter v.
Brown, post.

2 Burr. 1005;
—1012.

1792.

The jury returned with a verdict for the plaintiff for 159*l.* 12*s.* 9½*d.* damages.

NOTE.—This verdict was the first within my notice, where the jury went any considerable length, to punish fraud, by penal damages. The example deserves imitation, and if it were generally followed, little or less inconvenience would flow from the want of power to decree a specific performance. The verdict appeared (from a paper which the jury handed to the prothonotary) to have been made up thus:—

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Debt,	42	0	0
Interest,	17	12	9½
Damages,	100	0	0
	159	12	9½

A motion for a new trial was talked of, on the ground, that *indebitatus assumpsit* being of the nature of an action of debt, the jury could give no more damages than the interest. But the parties accommodated the matter; the defendant paid, I believe, 112*l.* and we heard no more of it.

ROBERT M'KEE v. GEORGE THOMPSON.

THE declaration stated, that the defendant's father was indebted to the plaintiff 17*l.* 7*s.* 3*d.* that the defendant, *his executor*, referred the claim to arbitrators, who made an award in favour of the plaintiff; and that the defendant *as executor as aforesaid* promised to pay. The pleas were *non assumpsit* and payment, and *non assumpsit infra sex annos*.

It appearing on the evidence, as stated in the declaration, that the debt was not the debt of the defendant, but of his father, whose executor he was; that the reference was entered into by the defendant *as executor*; and that the award was against him *as executor*;

Woods, for the defendant, moved for a nonsuit.

Young, for the plaintiff. The defendant might have demurred, but having pleaded to issue, must now move in arrest of judgment.

PRESIDENT. For a variance between the count and the evidence, the court may direct a nonsuit. But for

a variance between the count and the writ, the defendant must demur, plead in abatement, or move in arrest of judgment. This is a variance between the count and the writ; the writ charging the defendant personally, and the count charging him as executor. The defendant has neither pleaded in abatement, nor demurred; but pleaded to issue. This issue must be tried. The evidence supports the allegations in the declaration. The jury may find a verdict against the defendant as executor; and the defendant may move in arrest of judgment.

The jury found a verdict against the defendant *as executor* for 17l. 7s. 3d.

A motion in arrest of judgment was made; and a rule to shew cause was entered. It was not argued till *December* term, 1793.

Young, for the plaintiff, shewed cause against the motion.

An executor is bound by a promise to pay, though he has no assets.

The addition of *executor* will be rejected as surplusage. *Brown v. Dunnery—Wallis v. Lewis.*

The reference was as executor; so is the declaration. It is according to the truth of the case.—*King v. Thom.*

If an executor refer a dispute to an arbitration, he is bound by the award; and cannot afterwards plead *plene administravit*.—*Barry v. Rush.* And the verdict being against the defendant *as executor*, cannot alter the legal effect of the award on the submission.

Woods, for the rule. The cases only say, that, where there is a promise, the executor shall not say, there are no assets. The case of *Barry v. Rush* does not say, that a judgment can be given, though the writ be against a defendant personally, and the declaration against him as executor. No case says so: and there is a material difference between an action against a defendant personally, and against him as executor.

PRESIDENT. Justice *Buller* determines the case of *Barry v. Rush* on this point, that it was an action on a bond, by which the defendant bound *himself*, his *heirs*, *executors*, &c. to pay; an express, solemn, and personal promise. I think this the true ground of the decision. But if the doctrine laid down by Justice *Aspurst* can be extended generally to all cases, and if our opinion should

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Swinb. 395.
Bane's case, 9
Co. 63.
Wheeler v.
Collier, Cro.
El. 46.
Hob. 208. 2
Ld. Ray 1215.
2 Esp. 23.
1 Vent. 119.
1 T. Rep. 487.
1 T. Rep. 691.

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be against the plaintiff in this motion; we may, on his motion (on the ground, that the submission and award amounts to an admission of assets, or a promise, on consideration, to pay) set aside the verdict, as contrary to the legal effect of those facts. For, (on this ground) the declaration would, in effect, state a personal promise, and would not vary from the writ. Justice, as well as true interest, seems to suggest, that the defendant ought to settle this matter out of doors, without more delay.

NOTE.—The case of *Pearson v. Henry*, which denies, that a reference, by an executor or administrator, to an arbitration, is, of itself, an admission of assets, was not known here, when the preceding case was argued. However, no decision was called for; as the defendant gave judgment, with some delay of execution.

WASHINGTON COUNTY,

April Term, 1792.

THOMAS PHILIPS v. JOHN McDONALD.

1 St. L. 193.

AN action of debt for the penalty, on the act of assembly against usury, had been brought before a justice of the peace. The justice having given judgment for the plaintiff, he appealed. It was agreed, by the counsel on both sides, "that, if the opinion of the court were, that the justice had jurisdiction, the defendant should plead to the merits; and that if the justice had not jurisdiction, the plaintiff should be nonsuited."

Refs for the defendant. The act against usury, being a penal law, must be strictly pursued. A justice of the peace is no court of record, but an exception out of the ordinary jurisdictions. The acts of assembly distinguish between courts of record, and justices of the peace. If a penalty be declared against a particular conduct, there must be a conviction by a jury, before the penalty can be recovered. The words, "essoign, protection,

1 St. L. 204,
227, 228, 238
248, 271, 273
389, 423, 467
2 St. L. 4, 5,
12, 73, 184,
5c. old editions.

wager of law," apply only to proceedings in courts of record. Only the four courts of *Westminster* are courts of record, for such a purpose as this. No suit for a penalty can be brought in *England*, in the Quarter Sessions, or Stannary courts, or courts of Sewers, or courts of Conscience, or courts Leet, though courts of Record *diverso intuitu*. 1792.

Brackenridge, for the plaintiff. The *English* law cited, applies only to criminal prosecutions. The statute of usury is to be considered with those giving the justices jurisdiction of 40s. 5l. 10l. "*All debts*" includes this; for it is not among the excepted cases, "*Rent*," &c.—The defendant may appeal, and have a jury trial. The law intends a benefit; and it ought to be given in the easiest manner possible. Usury is a political evil, a forestalling of money, and oppressive to people in distress.

Ross, in reply. Justices have jurisdiction only in contracts express or implied; never in torts. There is no appeal under 40s.. Wherever jurisdiction over penalties is given to justices, it is given in express words.

Cur. adv. vult.

NOTE.—This case was never mentioned again. I believe the plaintiff gave it up. See *Gregory v. Blasford*, *Barnabee v. Goodale*, *Curlews v. Dudley*, *Farren v. Williams*, *White v. Boot*, *Leigh v. Kent*. But the act of 19 of April, 1794, c. 234. §. 10, has settled this question, on this point, for the future, and given justices jurisdiction in cases of penalties for usury.

6 Co. 19, Cro.
El. 737. 2Ld.
Ray, 872.
1Bac Abr. 40
2T. Rep. 274.
3T. Rep. 362.
3St. L. 536.

JAMES HINDMAN v. JAMES LOGAN.

PROCEEDINGS to recover a demand, before a justice of the peace, who had given judgment for the plaintiff before him, were removed by *certiorari* into the court of *Common Pleas* of *Washington* county.

Ross, for the plaintiff in error, filed seven exceptions to the record sent up.

1. It does not state the ground of the demand, so as to be a bar to another suit for the same cause.

2. If there was any cause of action, it was for rent; and the title of land must have come in question.

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3. No summons, appearance, or confession of the defendant is stated.

4. The plaintiff exhibited no account, nor sued out a summons, nor directed the justice to issue a summons; the summons was issued by the justice without any authority from him.

5. The justice was interested, and the money was claimed by him; and the name of the plaintiff used without his consent or knowledge.

6. The judgment was entered wrongfully and without evidence.

7. The record is not so full and entire, as it remains before the justice. There is no summons. It is informal, &c.

To establish some of the exceptions, the deposition of the plaintiff in error was offered.

Young, for the defendant in error, objected that the witness was interested.

Dall. 268,
405.

Ross, cited *Guthrie v. White*, and *Pinchin v. Fry*;—and distinguished between evidence to a court, and evidence to a jury.

The court held the first exception sufficient to reverse the proceedings; and ordered the money to be restored with costs.

ALLEGHENY COUNTY.

June Term, 1792.

PENNSYLVANIA *v.* ROBERT M'BIRNIE.

ROBERT M'BIRNIE was indicted, together with another man, at a court of Oyer and Terminer for that he "intending to maim *Adam Cotter*, of malice aforethought, and by lying in wait, unlawfully and feloniously did make an assault on the said *A. Cotter*, and him did beat, wound, and ill treat, and of malice aforethought, and by lying in wait, did gouge and bruise his right eye,

and bite off his nose, with intent to disfigure him, against the statute, &c." 1792.

Galbraith, for the state, read the act of assembly of 1811 May, 1718, making the offence stated in this indictment a felony of death. 1 St L 136. 1 Hawk. c. 44.

The case was as follows. *M^cBirnie*, with the other person indicted, coming out of *Pittsburgh* drunk, overtook *Cotter* on the road. They were strangers to him. *M^cBirnie* insulted *Cotter*, knocked him down; gouged his eye, and bit a piece out of one of his nostrils, at the point of his nose. At the time of the trial, the eye had become quite sound, and the nose was healed up so as not to appear greatly disfigured.

Brackenridge, for the prisoner. Your verdict must determine whether for the offence stated to you, this man shall suffer death. This is a most aggravated assault and battery, and I know no punishment short of death too great for it. But the offence proved is not that laid in the indictment. The intention of the makers of the statute is to be regarded; and that is to be collected from the occasion of making it. The *Coventry act* (as it is called in *England*) from which this part of our act is taken, was made on occasion of a gross outrage perpetrated on Sir *John Coventry*, in revenge of some words spoken by him in the *House of Commons*. That transaction, and *Cook's* case on the *Coventry act*, is a good description of the offence pointed out by our act. Malice aforethought is to be collected from the circumstances, deliberate violence, a weapon likely to kill or maim, &c. In the case in *England*, there was a deliberate compassing, and lying in wait, and the nose was slit with a weapon, which shewed design. *Cotter's* eye is not "put out," nor his nose "cut off," or "slit;" there is only a small piece bit off, which will happen in any scuffle, without a previous purpose. Though the offence be odious, the statute is highly penal. 4 Bac. abr. 647-9. Hume's Eng. c. 65. 4 Comm. 207. 6 St. Tr. 212. 3 Bac. abr. 665 666. 2 Ld. Ray, 1488.

Galbraith, for the state, contended that there was malice aforethought, and that it may, on many occasions, be difficult to prove express malice.

PRESIDENT. In murder, malice is presumed from the circumstances, and the defendant must shew the want of it. If *M^cBirnie*, therefore, instead of maiming, had killed *Cotter*, it would have been murder, or a kill-

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ing, with malice aforethought. But the act of assembly, which makes this maiming a felony of death seems to take much pains to render a previous purpose an essential ingredient in the crime. The words of purpose, with malice aforethought, by lying in wait, and with intent to disfigure, seem to imply something more, than the malice presumed in murder, and to require express proof of the intent to disfigure previously conceived, and insidiously carried into effect. This case is evidently a hasty quarrel, a violent outrage, by a wild young ruffian, frantic with liquor; and I think there are not circumstances sufficiently strong, to make it felony.

4 Comm. 207.

1 Hawk. 176.

No case on the *English* statute has been cited, nor has any occurred to me, but that of *Cook* and *Woodburn*, for slitting the nose of Mr. *Crispie*, whose face was terribly hacked with a hedge bill. And, from the device of the court to get over the impudent defence of *Cook*, that he did it, with intent not to disfigure, but to kill, we may gather how strongly all the circumstances of this crime must be ascertained.

The jury found him guilty of the trespass in assaulting and beating *Adam Cotter*, except as to the contriving and intending to maim and disfigure him of purpose and of malice aforethought, and by lying in wait, and of that not guilty. Sentence imprisonment.

The other defendant was afterwards tried and acquitted generally.

NOTE.—It would seem that few, if any, other indictments on this act, have existed in this state. For the late *William Bradford*, Esq. (who from his situation as attorney general, had good opportunity of knowing) while a judge of the Supreme Court, in a memorial written at the request of the governor, and presented to him 3d December, 1792, and afterwards published under the title of "An Enquiry how far the punishment of death is necessary in *Pennsylvania*," mentions, that "this act has remained a dead letter in *Pennsylvania*. No person has been prosecuted under it."

Enquiry, &c.
p. 33.

3 St. L. 599.

The act of 22d April, 1794, has changed the punishment of this offence into confinement at hard labour, and a fine, three fourths of which goes to the party grieved.

Leach's

Crown Law,

55, 59, 192,

194.

I find there have been many prosecutions on the *Coventry* act in *England*. See *William Lee's* case, *Barney Carroll's*

case, *Tickner's* case, and *Mill's* case. In *Tickner's* case, Justice *Gould* told the jury, that it was not necessary, that either the malice aforethought, or the lying in wait, should be expressly proved to be on purpose to maim and disfigure. In *Mill's* case, *C. Baron Eyre*, said, a person who intends to do this mischief, and, by *deliberately watching an opportunity*, carries that intention into execution, may be said to *lie in wait on purpose*. A particular concealment or lurking place is not necessary; if, having formed an intention to maim, he comes unawares behind, and takes a convenient opportunity of deliberately doing the injury, it is a *lying in wait*, though he takes no particular length of time, nor appears to use any extraordinary degree of preparation to perpetrate the mischief.

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JOHN M'KEE v. Executors of ELEAZER MYERS.

THIS was an action of *assumpsit* founded on an order in the words following:—"March 21st, 1788—Sir, I make bold to trouble you to let *John M'Kee* have to the amount of one hundred pounds in certificates on my account, if he stands in need of it, and this shall be your receipt from your friend, *Eleazer Mires*.—To Col. *John Irwin*." *E. Myers* died. *John Irwin*, to whom the order is directed, is one of the executors and, having since refused to satisfy the order, this action was brought.

Proof having been made, that *Myers* had desired one *Robert M'Kee* to write an order to this effect, and sign his name to it; *Woods*, for the plaintiff, was proceeding to read the order; when *Brackenridge*, for the defendant, objected to its being read, unless *Robert M'Kee* who wrote it, were called, to prove that he wrote it, agreeably to the directions of *Myers*, and signed *Myers'* name to it, by his authority; and that the order now produced was the order written at the time the witness spoke of, and that the name of *Myers* was in *Robert M'Kee's* hand writing, and by the authority of *Myers*. *Robert M'Kee*, being uninterested, and the best witness, must be here. Mr. *Brackenridge* strongly hinted, that

1792. it was a forgery, and that *Robert M'Kee* would not dare to swear to it.*

Woods, for the plaintiff. There is no subscribing witness ; and proof of hand writing is enough.

PRESIDENT. This is not the case of a note or order subscribed by the maker or drawer : in that case, if there be no subscribing witness, proof of hand writing is sufficient. Here the person who wrote the note, and subscribed the name, is uninterested, is the best witness, and ought to be here. However, as the objection might have been unexpected, appeared new, and might have been supposed to deserve less weight, than has been given to it ; it would be best to withdraw a juror by consent.

This was done : and this case was tried again, at *December* term, 1792 ; when *Robert M'Kee* attended, and proved this order to have been written and signed by him, at the request of *Myers*, and exactly as he dictated. It was also proved, that *John Irwin* was, at that time, in *Philadelphia*, and had in his hands certificates the property of *Myers* ; which *John M'Kee* wanted to pay for land warrants. But before *John M'Kee* arrived at *Philadelphia* with the order, *John Irwin* had left the city ; and the order was never presented, till in the spring of the year 1790, after the death of *Myers*. The plaintiff also proved the payment of 14*l.* to one *Murphy*, in 1787 or 1788, on account of *Myers*, which, it was now asserted, on the part of the plaintiff, was the consideration for this order or part of it. But the defendants proved, that in the fall of the year 1789, *J. M'Kee* and *E. Myers* settled all their accounts, when there was a balance found due to *Myers*, for which *M'Kee* gave his note, with a receipt in full for all debts, dues, and demands ; which was produced, dated 16th *November*, 1789. Between *March* 1788, and the spring of 1790, *J. M'Kee* had often applied to *J. Irwin*, to do business for him, in the land office, and had often complained of disappointment in certificates—once wrote him a letter, and sent him certificates to do his business ; but never mentioned this order, till the spring of 1790, after the death of *Myers*.

* *Robert M'Kee* was, in fact, then indicted for forgery. —See next case.

PRESIDENT. This order appears to be but an *authority* to receive the certificates, and this, not being exercised in the life time of *Myers*, expired by his death, which transferred to his executors all his property in the certificates. As to the 14^l. paid to *Murphy*, it was included in the settlement of accounts, and released by the receipt of 16th *November*, 1789. Therefore no interest remains in *M'Kee*, from the order, and there ought to be a verdict for the defendant.

The plaintiff then suffered a nonsuit.

WESTMORELAND COUNTY.

June Term, 1792.

PENNSYLVANIA v. ROBERT M'KEE.

ROBERT M'KEE being sued by *David Semple*, before a justice of the peace, for a balance of about thirty shillings, set up a defence, that the debt was contingent, and that the contingency had not happened. — The justice gave judgment against him, and *Semple* dying, *M'Kee* went to the justice and produced a receipt in full, which he said was given him by *Semple*, and had been discovered by him since the judgment. The receipt had been originally given by *Semple* for a debt paid to him as administrator of *Samuel Miller*. But there was now an interlineation, in different ink, and smaller letters, immediately above the name of *David Semple*, as follows, "and one pound ten shillings in full of my demand against *Robert M'Kee*." The original receipt and the interlineation were in the hand writing of *M'Kee*; but it was the interlineation only that was charged as a forgery.

There were three counts in the indictment. All stated the particular circumstances. The first was on the act of assembly; the 2d was at common law, for forging

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1792. this receipt; and the 3d was at common law, for uttering this receipt knowing it to be forged. The subscribing witness proved, that the interlineation was not in the receipt, when it was signed; and it was also proved, that the receipt being detained as suspicious, by the justice to whom it was offered as evidence of payment, *McKee* had paid the balance to the administrators of *Semple*.

Brackenridge, Ross, and Young, for the defendant.—The *British* statutes against forgery extend not here. It is not forgery at common law, for it is not a deed, nor is it forgery by our act of assembly. It is no false composition, but a real receipt. Comparison of hands is no evidence in criminal cases, and the proof here is only by comparison of hands. *Sidney's case*.

Woods Infl.
4:8.
1 St. L. 5.

4Comm. 358.

The case of the *King v. Ward*, was out of the common way, a severe proceeding on the interposition of the house of lords, to avenge one of their own body; and the doctrine there laid down changes the whole law on the subject, and is not supported by any authority.

2 Ld. Ray.
1461.

2 Ld. Ray.
1461. 2 Bac.
abr. 569.
1 St. L. 5.

Galbraith and Nagle contended, that it was a forgery at common law, and on our act of assembly, citing the *King v. Ward*—and other authorities.

PRESIDENT. Though the first count pursues not the words of the act of assembly, yet if it state facts, which, in legal construction, amount to counterfeiting the hand and seal of another; why should it not be a good indictment on the act of assembly? Such facts are here stated.

1 St. L. 5, 64. This however may be questionable.

2 Hawk. 354.

But there is no doubt, that the second count at common law fully comprehends this case; and that the forgery of *any writing*, which may be prejudicial to another, is forgery at common law. The case of the *King v. Ward* is well founded, both on authority and principle; and we rely on it, as conclusive in the present case.—The third count is also at common law, for uttering this receipt, knowing it to be forged, and is good, if the facts are proved.

2 Ld. Ray,
1461.

As to the evidence; where the matter is *doubtful*, it is a good rule, to incline to acquittal. But presumptive evidence, however decried or dangerous, is often decisive, and as convincing to the mind, as the most positive testimony. It is the language of facts. And, to reject

it, would, in cases of private villainy, such as this indictment states, hold out a general charter of pardon. Comparison of hands, or proof by witnesses acquainted with the hand writing, is proper proof to be left to a jury, especially where, as in the present case, the writing is found in the possession of the party. Whether the presumption arising from such proof will outweigh the common presumption of innocence, and produce conviction, may depend on the concurrent circumstances, and their impression on the minds of the jury.

We think the proof strong against the defendant, and sufficient, if you believe it, to justify you in convicting him of forging this receipt, and uttering it, knowing it to be forged.

Verdict not guilty, on the 1st count; and guilty, on the 2d and 3d counts.

At *December* term, 1792, a motion in arrest of judgment was argued, on the following grounds, by the defendant's counsel.

The jury having acquitted *Robert McKee*, on the first count, we have only to examine whether any judgment can be given on the second or the third. The third count will require little attention. The bill was found, at *March* sessions, 1792, and tried at *June* sessions, on the 14th of *June*, 1792, and the third count lays the publication on the 27th *June*, 1792, which is about two weeks after the trial, and three months after the finding of the indictment. The offence laid in the third count being thus impossible, it remains only to consider, whether judgment can be given on the second count.

The second count charges *Robert McKee*, "that he, on 19 *November* 1790, having in his possession a certain receipt in writing, signed by one *David Semple* (lately deceased) which receipt was in the words, letters, figures, and cyphers, following, that is to say, *Received 19 November 1790, the sum of 4l. 10s. in part of a debt due to the estate of Captain Samuel Miller, deceased, for a mill-saw—David Semple*, he, the said *Robert McKee*, afterwards, that is to say, on the said 19th day of *November*, in the year of our *Lord* 1790, with force and arms, at the township aforesaid, in the county aforesaid, the said receipt falsely did alter, and cause to be altered, by falsely

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4 Comm 358.

Gilb. L. of

Evid. 53.

2 Hawk 607.

Ld. Ray 40.

2 Bac. Abr.

313. 1 Burr.

644.

2 Hawk. 325,

326.

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forging and adding the cyphers, words, and letters, *and one pound ten shillings in full of my demand against Robert M-Kee*, with intention to defraud the foresaid *David Semple* (deceased) of the sum of *one pound ten shillings* against the peace, &c."

We think judgment cannot be given on this count.

Rex v. Tucker, 1 Ld. Ray, 1.

1. The indictment must state an offence, with sufficient certainty, without any explanatory matter *dehors* the record, and so, as, if proved, no presumption of innocence can remain. Now this count states not, in what part of the receipt the inserted words were inserted, but only that the words were inserted on the same paper. They might have been below the name of *David Semple*, and so it would not have been his receipt, and he could not have been defrauded. So also it might have been on the back of the paper.

2. This count states not what *the words and cyphers inserted* were; and the court is not now to know, in what manner they were proved; but to judge only from the record, and it ascertains not what words were added.

As the court will make no intendment to criminate the defendant, nor aid the indictment, by the evidence, we move, that the judgment be arrested. And we would suggest, that there was at the trial ground to believe, and we can now prove, that the sum expressed in the receipt was really paid; that, at any rate, the offence is trivial, and the defendant has been sufficiently punished, by the anxiety, expence, and trouble, which he has undergone.

This case was mentioned again, and the opinion of the court given, at *June* term, 1793.

PRESIDENT. As the most natural presumption to be drawn from the face of this indictment is, that the words constituting the forgery were added after the name of *David Semple*; and, if this were the case, the fraud, if any, would have been so palpable, that no man could be deceived by it; the judgment must be arrested, on the second count.

It clearly must be arrested on the third count, the time laid in the indictment being contradictory to the caption and the trial.

FAYETTE COUNTY.

June Term, 1792.

JOHN PORTER v. BASIL BROWN.

IN *assumpsit*, there were three counts. The two first were on a special undertaking to pay *Porter* 33l. 9s. with interest from 15th *November*, 1787, due by one *Campbell*, by bond dated 27th *March*, 1788. The consideration of this promise was the sale of a house by *Campbell* to *Brown*, on which *Porter* had a mortgage for the sum demanded. The third count was for money had and received. The bond produced had no date, but it had been pasted to the mortgage, which was dated 27th *March*, 1788, and recited a bond of the same date, and for the same sum.

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It was proved, that, about a month after the date of the mortgage, *Brown* sent a message to *Porter*, that *Campbell* had left this country, that he had purchased *Campbell's* house mortgaged to *Porter*, and, by contract, was to pay the debt due to *Porter*; that he would come to *Porter*, but was afraid of the smallpox; but if *Porter* would come to him, he would give his own bond for the money, and security if required; and that all that he wanted was a little time to make the payment. This message was delivered to *Porter*, who said he was satisfied. *Porter* did not record his mortgage.

Rafs for the defendant. The plaintiff cannot recover on the first or second count, as the declaration states a bond dated 27th *November*, 1788, and the bond shewn has no date. And if he undertake to recite a deed, he must do it exactly; or if he state a special agreement, he must prove it as laid. He cannot recover on the third count, for he has proved no money received by the defendant for his use.

Woods for the plaintiff. The bond is but matter of inducement; not the gift of the action. It has been pasted to a mortgage, which recites it as of even date,

1792.

March Term
1792, Ante.
p. 22.

and is dated 27th *March* 1788. On the third count the plaintiff will recover; for the house being then bound to the amount of the mortgage, it will be presumed, that, when *Brown* bought the house, he gave the price, and got back so much from *Campbell* as would pay the plaintiff. In the case of *Farnesly v. Murphy*, in the court of Common Pleas of *Allegheny* county, a case resembling the present, the plaintiff recovered by the direction of the court, on the authority of decided cases.

Alcorn versus
Westbrooke, 1
Wils., 115.
Payne v. Ba-
combe, *Doug.*
628.

PRESIDENT. Where the plaintiff's proceedings have carried any appearance of hardship on the defendant, as in penal actions; or where the pleadings have been unnecessarily extended by him; he has been held to very strict rules; and opportunities have been eagerly seized, to nonsuit him. He has been treated with much greater indulgence, when the plain rules of justice have required, that he should recover.

Perry v. Ni-
ebolson, 1 *Bur.*
278.

The declaration is of a debt due on a bond, dated 27th *March*, 1788. The bond produced is without date. The declaration states a promise to pay a debt due on a bond. The evidence is of a debt due on a mortgage. It might be said, that the date of a bond is immaterial, and the bond itself but matter of inducement. And as the ground of the action is not the bond of *Campbell*, but the promise of *Brown*, it may be questioned, whether the variance be material, and whether there ought not to be a recovery on the first or second count. We should be unwilling to nonsuit a plaintiff on a mere formal exception: and, in this case, we conceive ourselves not to be under this necessity, because, in our opinion, he ought to recover on the third count. We rely on the authorities, on which the decision in the case of *Farnesly v. Murphy* was founded, and on all the circumstances of this case. The consideration was valuable and full.—*Porter's* conduct was fair and indulgent; and his claim just. Relying on the promise of *Brown*, he did not record his mortgage, and so lost his lien on the house, which remained unincumbered in the hands of *Brown*. The two first counts for the same sum gave *Brown* notice of the nature of the demand, and prepared him to answer it. In such a case, every presumption possible of methods in which the defendant, by receiving the house, might have received money for the use of the plaintiff,

ought to be made: and there should be a verdict for 33*l.* 9*s.* with interest from 15th March, 1787. 1792.

The jury found a verdict for 42*l.* 12*s.* 4*d.*

NOTE.—The following cases were not known here, when *Porter v. Brown* was tried. *Israel v. Douglass*, in C. B. H. Bl. 239. Easter Term, 1789.—The first count was for money had and received. The defendant was indebted to D. 64*l.* 9*s.* who was indebted to the plaintiff 40*l.* D. applied to the plaintiff to lend him a further sum. The plaintiff refused without security. D. gave him an order on the defendant for the sum due to him. The plaintiff sent this order to the defendant, who agreed to pay the plaintiff the sum really due to D. and thereupon D. received 70*l.* from the plaintiff. Lord *Loughborough*, Chief Justice, *Gould* and *Heath*, Justices, thought this sufficient to support the count for money had and received. *Wilson*, Justice, thought not, unless it had been shewn, that money had been received by the defendant for the use of D.

Leary v. Goodson, B. R. Easter Term, 1792. The plaintiff having distrained pictures of P. his tenant, the defendant agreed, if the plaintiff would deliver the pictures to him, that he would pay the rent. The court held, that this would not support a count for money had and received; and that a sale of the pictures by the defendant could not be presumed here, as in the case of the masquerade ticket; for a contrary presumption rises, from his receiving the pictures, to avoid their being sold. 4 T. Rep. 687. Doug. 132.

WASHINGTON COUNTY.

June Term, 1792.

GEORGE HENRY, surviving obligee of ABRAHAM USHER, v. WILLIAM DONNAGHY and JOHN MORRISON, Executors of JOHN DONNAGHY.

THIS was an action of debt on a bond dated 17th July, 1776, for the payment of 50*l.* 3*s.* 8*d.* on the 1st August ensuing the date, with interest from the date.

D 4

1792.

On 17th July, 1776, John Donnaghy gave to the plaintiff an order drawn by Edward Hand on James Milligan, merchant in Philadelphia, dated 13th July, 1776, for 27l. payable to John Donnaghy or bearer, at forty days sight. And the plaintiff gave Donnaghy a receipt for the order, purporting that credit was to be given on the bond for it, when paid. In 1786, Donnaghy sent by a friend, the residue of the debt and interest to the plaintiff, who then refused to give credit for the order, and offered to return it. This was rejected, and the residue of the money was not paid because credit would not be allowed for the order. In 1788 this suit was brought. It did not appear that there had been any demand on Milligan, or any notice to Donnaghy that the order remained in the plaintiff's hand till in 1786, nor was it ever offered to Donnaghy, nor to his executors till after this suit was brought.

*Chamberlayne
v. Delaree,
2 Wils. 353.*

Ross, for the defendant. The order, being retained so long, amounts to a payment of so much. Donnaghy could not, at this distance of time recover from Hand the drawer.

Woods, for the plaintiff. *Usher* and company could not sue on this order in their own names. The receipt shews, that no credit was to be given till the order was paid. In 1786, in 1788, and now, Hand and Milligan are both in undoubted circumstances, and there is no instance when the not returning of a bill has been held a payment, unless there has been an insolvency of the drawee.

PRESIDENT. This difficulty is not likely to occur often, where the drawee is in good circumstances and has not refused payment; for then there is no inducement to apply to any other. But, since giving an order is held to be a giving credit to the drawee, and therefore a payment, I see no reason why it should not be, so in all cases; so that such holder should never be allowed to have recourse to the drawer, who had effects in the hands of the drawee. The holder, who gives credit, takes all risk of recovering from the drawee; for the drawer undertakes that the drawee will accept and pay at the time; but if the holder gives further time, he makes a new contract, and discharges the drawer. The holder undertakes to demand; and, be-

1 T. Rep. 455

fore he can recover from the drawer, or any indorser, (for every indorser is as a drawer) he must shew a demand on the drawee, and a refusal. The circumstances of the drawer and drawee ought to make no alteration. If they be good, so much the better for the holder, the plaintiff, unless he has precluded himself, by his own negligence. If they are otherwise, the defendants ought not now to run the risk. I lay no stress on the want of an indorsement. The receipt and the delivery of the order shew the meaning of the parties. *John Donnaghy* undertook to lend his name to *Abraham Usher* and company, for the recovery of this money from *Milligan*; and *Abraham Usher* and company, undertook to demand this money. This demand has never been made. There ought to be credit given on the bond for 27*l.* as paid forty days after sight, allowing a reasonable time for that.

The jury found a verdict accordingly.

NOTE.—See the case of *Stedman v. Gooch*.—*Espinasse's* Reports of Cases at Nisi Prius, 3.

WESTMORELAND COUNTY.

September Term, 1792.

PENNSYLVANIA v. SAMUEL WADDLE.

WADDLE was indicted for a forcible entry and detainer, on 2d *June*, 1790, of a messuage, &c. in *Derry* township, in possession of *Andrew Johnson*.

Ross, for the prosecutor, called a witness, to prove that the defendant was within the lines of the prosecutor's claim.

Woods and Young, for the defendant, objected to this testimony, till proof should be made, that the prosecutor had been in actual possession of the premises.

1792.

1 Hawk. 280
§ 23, 290. §
53.

1 Hawk. 290,
§. 54.

1 Hawk. 288,
§. 46.

PRESIDENT. It is said, that if a man be in possession ever so long by virtue of a defeasible title, and continue, after a claim by him, who has the right of entry, it is a new entry; and if, after that, he hold by force, it is a forcible detainer. I should be disposed to construe a defeasible title to mean a tenancy at will, or such, as, by the mere entry of the owner, may be defeated. It is also said, that the three years possession must be of a lawful estate; yet I doubt whether an entry or claim of one, not having the right of entry, would defeat the protection of three years peaceable possession. And it may be said, that, if a forcible detainer be an offence, even after a peaceable entry, it matters not, whether, at the time of the entry, there was an adverse possession, or not. But it is expressly stated, that it is only an *actual* possession, and not a *legal* possession, in the prosecutor, that will warrant restitution to him. On the whole, we think it safest to say, that actual possession ought to be proved in the prosecutor.

There was then evidence and argument on both sides.

PRESIDENT. There are two points to be established, to found a conviction.

1. Possession of the prosecutor; and
2. Force by the defendant.

1. As to possession: it does not appear, that *Johnson* had possession till after *Waddle* was in possession, and after the force alledged. If he had no possession before the force alledged, the defendant cannot be guilty.

2 Burns 179.
2 Bac. abr.
558.

2. If there was no force, he cannot be guilty. Words are the slightest symptoms of force. If you think it was the meaning and tendency of the words, to impress on *Johnson* a terror of personal harm, if he should proceed to take possession; this is force. If you think their meaning was only to signify that *Waddle* would not give up his claim, which he thought a just one, till by a legal trial, it was declared unjust; this is not force: and whatever might be the possession, the defendant must be acquitted. One of the witnesses understood it in this sense.

The jury found the defendant guilty: stating that they found force in the detainer only, not in the entry; and that they considered *Johnson* in possession from the commencement of his title, which was a sale by the commissioners.

A new trial was moved for, and granted, on the ground, that there was not evidence of possession previous to the supposed force. 1792.

At the second trial, at *December Sessions*, 1792, the case appeared as before. It was stated to the jury, that there was no proof of possession, and, therefore, that the defendant ought to be acquitted.

The defendant was acquitted.

FAYETTE COUNTY,

September Term, 1792.

RICHARD WALLER v. JONATHAN HILL.

THIS was an action of covenant. *Waller* had sold to *Hill* 600 acres of land in *Washington* county, to be paid for in whisky ; and for the failure of payment, this action was brought. *Waller* had bought this land from one *Hawkins* ; but had no title to more than 100 or 200 acres ; the title to all the lands round it being in other persons, and among others, in *James Stephenson*, to whom, by a conveyance duly recorded, the same *Hawkins* sold. *Waller's* conveyance from *Hawkins* was not recorded.

Woods, for the defendant. *Waller's* conveyance from *Hawkins*, not being recorded, is void as against *Stephenson's* conveyance from *Hawkins*.

Bradford, for the plaintiff. The act of assembly, for recording deeds, extends only to legal titles. The title of *Hawkins* was only equitable, an improvement claim.

PRESIDENT. As improvement claims pass from one to another, for valuable considerations, the same inconvenience, and danger from frauds, would arise, from keeping such conveyances concealed, as from concealing conveyances from strict titles.

If the land sold by *Waller* to *Hill*, was the same sold

1792. by *Hawkins* to *Stephenson*, and *Stephenson* had not notice of the previous sale to *Waller*; *Stephenson's* title was good, at the time of the sale to *Hill*; and, for so much, there was no consideration. But if not, and if *Hill* has got the land, or might have got it; he must pay for it, or for so much as he has got, or might have got.

There was a verdict for the defendant. The plaintiff had formerly recovered part of the price.

ALLEGHENY COUNTY.

December Term, 1792.

PENNSYLVANIA v. HENRY MISNER.

MISNER was indicted—1. For forging an assignment to *William Irwin*, of a bill given by *Misner* himself and *James Read*, to *Eneas Randall*.

2. For uttering this assignment, knowing it to be forged.

The evidence was that *Misner* having in his possession a single bill on himself and *Read*, assigned it, in *Randall's* name, for goods, to *Irwin*, who knew neither of them, and supposed him to be *Randall*. *Irwin* sued *Read* before a justice, and recovered, on this bill. It was also proved, that an order drawn by *James Read*, in favour of *Henry Misner*, for nearly the same sum, on *James O'Hara*, had been presented and paid.

Brackenridge, for the defendant, contended that there was no forgery, for the following reasons.

1. The name of the payee, in the body of the bill, is *Enos Randole*, and the name subscribed to the assignment is *Enos Randell*.

2. There being no seal to the assignment, no property in the bill is assigned, and no person could be injured.

3. *Misner* is a co-obligor in the bill, and only a surety. He paid it; and had a right to assign it, so as to recover

from *Read*, the real debtor : assigning a note on himself is equivalent to giving a new note, which he might do.

1792.

4. *Misner* being in possession of the note, he must be supposed to have authority to dispose of it.

PRESIDENT. 1. There is no evidence in what manner the person named *Enos Randole* in the body of the bill, who is the payee, really writes his name, for there is no evidence, that the bill was written by him. But if there were, the variance is so inconsiderable, that if the defendant were to escape under it, any man might accomplish all the dangerous effects of forgery, without risking the punishment. The variance makes not another name, but the same, for all purposes of deception.

2 Salk. 660.

Cowp. 220.

2. It is equally criminal to forge a name, as to forge a seal, if there be an intention and possibility to defraud. The name, without a seal, gives authority to demand, sue for, and receive, the money ; and, therefore, gives a full possibility of defrauding.

3. *James Read* is also obligor, liable to pay the whole money, and, in fact, has been compelled to pay it, by a competent authority. *Misner's* being an obligor gave him no right to use the name of *Randall* and make a note on him.

4. The defendant's having the bill in his possession is presumption of authority over it, and (if no obligation to pay remained on him, but did on *Read*) may reduce the transaction to an act of indiscretion, of a dangerous kind indeed to indulge, but not punishable as a forgery. The case then is brought to this point :—Did the defendant assign this bill, with intent to defraud ? That depends on this ; had *Read* paid it before ? Of this there is presumption, arising from the payment by *O'Hara*, on *Read's* order, of nearly the same to *Misner*. You must determine the fact from the circumstances.

The jury acquitted him.

DAVID FRANKS v. MICHAEL STIVERS.

1792.

THIS was an action of Trover for three barrels of spirits, and one of sherry wine. The case was thus. Stivers, a waggoner, undertook, at *Philadelphia*, to carry these and other goods from *Philadelphia* to the mouth of *Buffaloe*, on the *Ohio*, at a certain place; received part of the money at *Philadelphia*, and was to receive the rest on the delivery of the goods to *N. M. Farlane*, at the mouth of *Buffaloe*.

Before *Stivers* arrived at *Pittsburgh*, on his way to *Buffaloe*, *M. Farlane* died; and *L. Brinson*, an agent of *Franks*, in room of *M. Farlane*, agreed to take the goods at *Pittsburgh*, and send them to *Buffaloe* by water, deducting a certain part of the agreed price of carriage. The goods were accordingly delivered at *Pittsburgh*, except the goods in question, which were detained for the carriage, and stored up sixteen weeks; after which on reasonable advertisement, they were sold by *Stivers*, at public sale. Taking all things into view, there then remained a balance in *Stiver's* hands of 5*l.* 6*s.* 2*d.* The goods were all bought by the agent of *Franks*, for his use, so that he suffered no damage, but from not having the overplus of 5*l.* 6*s.* 2*d.*

2 *Ld. Ray.*
752.
2 *Esq.* 345.

Brackenridge, for the defendant. *Stivers*, a common carrier, had a right to retain till the carriage was paid. The inconvenience would be intolerable, if an obstinate owner might let the goods lie as long as he pleases.— The carrier, at a distance from home, having no place to keep the goods, might be obliged to pay storage, till, perhaps, the whole value of the goods be consumed, and no value remain, to satisfy the carriage. The carrier, trusting to the price of his carriage, has, perhaps, nothing else, to support himself and team, on his way home again. Therefore, having performed his service, by carrying the goods to the place agreed on, he has not only a lien on the whole goods, but, on refusal of payment, an absolute property in so much of them, as will pay the carriage. This is not like the case of a pledge, where the parties have no vesting of the property in view, and where the owner may have his goods, on payment of the money, and the lender, having no special

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1792.

time of payment, has no view to any inconvenience, that may happen. This is a new case: for, in former cases, the retaining of the goods has been a sufficient compulsion to pay the carriage. And, in this case, the sale of the goods has operated merely in the same manner, as a compulsion on the owners, to come forward, take their goods, and pay the carriage: for the owner has bought all, and got the goods, and so has received no damage except from the non-payment of the balance remaining in the defendant's hand. For this, a complete tender not having been made, there must be a verdict.

Woods, for the plaintiff. The inconvenience would be greater, if a carrier could immediately sell the goods, than if he must wait for his price, till the owner come and claim them. For, generally, the owner is under sufficient inducement from the value of the goods, to pay their carriage, and take them away. The power claimed for carriers, and exercised by the defendant, is against all law. And the court ought to declare so.

PRESIDENT. As it is admitted, that there ought to be a verdict against the defendant for the surplus; as the want of this is the only real damage, which the plaintiff has suffered; and as the sale was occasioned by his own gross delinquency; this does not seem to be a case proper for damages beyond mere compensation; and it is therefore unnecessary for us, to say any thing as to the right of carriers, in such cases; and perhaps, it will conduce most to justice, if they and owners, have a respect for the rights of each other.

Verdict for plaintiff accordingly.

WASHINGTON COUNTY,

December Term, 1792.

Lessee of ROB. HAMILTON v. VAN SWEARINGEN.

1792.

THE plaintiff's title was founded on a location in name of *Michael Marshall*, and a survey made on it for *Michael Marshall*, by the deputy surveyor.

Brackenridge and *McKeehan*, for the plaintiff, offered to prove, that a conveyance of this land from *Marshall* to the lessor of the plaintiff, made previous to the demise in the ejectment, had been lost; and therefore contended, that parole proof of its contents should be admitted.

Ross, for the defendant. Such testimony is dangerous, and introductory of fraud. The plaintiff might have got a deed of confirmation, reciting the first deed, and referring back to it; or he might have proceeded under the act of assembly, empowering the Supreme Court to supply defects in the titles to lands, occasioned by the loss of deeds.

PRESIDENT. The general rule is, that the best testimony in the power of the party must be produced. In some cases such testimony as is offered must be admitted from necessity. But it is of so dangerous a nature, and may be so adapted to the purposes of fraud, that necessity alone can justify its admission, and where safer testimony can be had recourse to, it ought to be constantly rejected.

In this case, *Robert Hamilton* might have proceeded in two ways, either of which would have been more safe, solemn, and certain; than this now proposed.

1. He might have applied to *Marshall* for a deed of confirmation. This would have been the safest and the best.

2. Or if *Marshall* refused, or could not be found, he might have applied, under the act of assembly, to the Supreme Court, where there would have been a kind of adverse proceeding, and, with notice and leisure to examine the circumstances, proper precautions could have been taken against fraud.

With these methods in the power of the plaintiff, we cannot say that the testimony offered is the best; and we therefore reject it. 1792.

The plaintiff suffered a nonsuit.

ALLEGHENY COUNTY,

March Term, 1793.

HUGH HENRY BRACKENRIDGE, v. ANDREW M^c FARLANE.

THE defendant appealed from the judgment of a justice of the peace against him for 10l. 1793.

The plaintiff declared here in *assumpsit* for his services, as attorney and counsel, in conducting a certain suit in *Westmoreland* county court.

Woods, for the defendant. There being a table of fees, fixing an attorney's fee, in any cause at four dollars, no action can be supported for any higher sum. And no action lies for counsel fees.

PRESIDENT. Attornies in this state, act in two capacities, as attornies, and as counsel. The plaintiff in any suit can recover from the defendant, no more than four dollars as his attorney's fee. But this does not limit attornies or counsel here, in their demands against their clients, for their services and management, as agents or counsel; and a jury may give, over this sum, a just compensation for such service and management.

The jury found a verdict for 10l. and judgment was given on it.

WESTMORELAND COUNTY.

March Term, 1793.

ARTHUR ST. CLAIR v. THOMAS GALBRAITH'S
Administrators.

1793.

SEVERAL actions of debt on bonds, which had been given in payment of lands sold, having been referred to auditors, and report made; the defendant's counsel moved to set this report aside; because the sums became due in the time of paper currency, and the auditors had not reduced them by the scale; but found the sums mentioned in the bonds.

Brackenridge, for the defendants. The authority given by the law to the auditors, to determine by equity, to what cases the scale applies not, ought to be liberally construed, but not so extended, as to destroy the law. I know, but two cases, to which the scale applies not.

1. Where the ground of action is evidence of a contract before the period of depreciation, though itself within it; as a bond given after, on a contract before the depreciation.

See *Wharton*
v. Morris.
Dall. 125.

2. Where it is the meaning of the parties, that the sum expressed shall not be paid in a depreciated currency. But to extend this exception, as the auditors have done here, and not to apply the scale, because the depreciation was not known here, when it took place in *Philadelphia*, will defeat the law, as much as if there never had been a scale. Instead of one fixed scale for the whole state, it will vary in infinite degrees, in every part of the state, and occasion all the inconveniences, which the law intended to prevent.

See *v. Eddis*.
Dall. 175.

Rofs and *Woods*, for the plaintiff. It was the intention of the law, to give to auditors a different authority from that of courts and juries; and constitute them chancellors with full authority to examine the justice of the case, and decide according to all its circumstances: the supposed value of the money; the place of the contract, the value of the property sold in the estimation of the

1793.

parties contracting, and the partial payments in depreciated currency, though not reducible, are all taken into consideration, to enable the auditors to ascertain what sum would really correspond to the intention of the parties expressed in the contract. This has been the uniform practice of courts and auditors. In the case of *Lee v. Biddis*, in the Supreme court, on a bond given on a previous contract made within the period of depreciation, the auditors did not confine themselves to the value of the money even at the time of the contract, but gave hard money. Exceptions were filed and argued, as here; but the court confirmed the report.* In the present case, the land sold was worth 2000*l.* hard money, and was sold for 2000*l.* when depreciation was unknown here. Of that sum, 1400*l.* was paid, when the money was at 20 for 1. And, when the whole sum in this report shall be paid, not more than half of the price in the view of both parties, at the time of the contract, will be paid. Courts have always rejected nice subtleties, to attain substantial justice. They have permitted a *feme covert* to be sued as *sole*. When a verdict against law, but founded in justice, as a verdict against the plea of the statute of limitations, has been obtained, they have refused to set it aside. When one has been convicted on an indictment, he has been forced under the influence of the sentence to be passed, to do justice to the party injured. If you seek equity, you must first do equity. Reports of auditors or arbitrators, judges chosen by the parties, are peculiarly favoured. The court will not take from us the advantage we have got, by this report, when taking this would deprive us of justice.

PRESIDENT. The case in the Supreme court is decisive of this. There must be judgment on the report.

* This case was a manuscript statement certified by Mr. *Burd*, prothonotary of the Supreme court. There was also a letter from Mr. *Lewis*, one of the counsel, stating it.

WESTMORELAND COUNTY.

Lessee of FREDERICK MERCHANT & PETER BRIGHT
v. JACOB MILLIRON's Executors.

1793.

THIS was an ejectment for 250 acres of land.

The plaintiff's title was a warrant to *Merchant* and *Bright*, for 250 acres of land on the waters of *Big Sawickly*, adjoining land of *Jacob Milliron*, &c. dated 10th *February*, 1786; a survey of 268 acres and 155 perches, and allowance, made 12th *April*, 1786; and a patent 27th *October*, 1787.

The defendant also shewed a warrant in name of *Jacob Milliron*, in trust for the heirs of his father, dated 23d *August*, 1786, for 200 acres; a survey on 12th *September*, 1786, of 220 $\frac{3}{4}$ acres; and a patent 12th *October*, 1786.

It appeared in evidence, that, upwards of twenty years ago, *Jacob Milliron* bought from *William Thomson* his claim to a certain tract of land. *Thomson*, who was surveyor of the district, surveyed it. And there was no other claim to it; nor was there any dispute with any of the neighbours about the boundaries. In *March*, 1780, *Milliron* had a house, a barn, and sixty acres of land cleared on it. On 4th *December*, 1784, *Milliron*, who had several sons, got two warrants (one in the name of one of his sons) of 300 acres each, charging interest from *March*, 1780. On these he had his whole claim surveyed on 26th *April*, 1785. This survey was found to contain 900 acres. The surveyor told the *Millirons*, that he could not return so much on their two warrants, and they must get another for the residue. He returned more than 300 acres on each, and run a line, by their directions, dividing the returned land from that not returned. This line was within 50, or 60 perches of *Milliron's* house, and cut off a small part of his meadow, and a piece of good bottom land, such as would be chosen as part of the place. *Merchant* and *Bright* never had any claim to any part of *Milliron's* claim, till they took out their warrant. And the surveyor never went on the land after the date of their warrant, but returned their survey, from the plat he had made for the *Millirons*. The plaintiff's warrant,

and *Milliron's* warrant of 23d August, 1786, were both for the land in *Milliron's* claim not returned on the two first warrants; and this was the land in dispute.

1793.

Brackenridge and *Galbraith*, were for the plaintiff.—*Rofs* and *Young*, for the defendant.

Brackenridge objected to the reading of *Milliron's* two first warrants, because it had been proved, that they were laid on other ground; and to any evidence of his improvements, unless they were within the disputed ground.

PRESIDENT. The defendants may controvert the proof of the warrants being laid on other ground, we cannot prevent their attempting it, the jury will judge. Let testimony also be admitted to shew where the improvements named in the warrant are, whether within or without the disputed lines, and how near them; that from their proximity or distance, with respect to the disputed lines, the intention of the *Millirons* expressed in the warrants, may be known, as to what ground is included in the warrants, whether the disputed land or not.

Rofs. The land-office will receive returns of survey to the extent of 400 acres and allowance, and even upwards, though the warrants call but for 100 acres: and the claimant will obtain a patent for the whole. But if less has been returned, and a speculator steps in, and takes the surplus of a fair claim, he has committed a fault, and will you not lay hold of the slightest circumstance, to defeat him. The 9th section of the act of 8th April, 1785, makes void every survey made before the warrant comes into the hands of the deputy surveyor, or without going on the ground. The plaintiff's survey is therefore void, as the surveyor never was on the land, after the date of the warrant. Of course the patent is void.

2 St. L. 316.

Brackenridge. The original ideas in this country, supported by the habits of thinking East of the mountains, and the opinions of courts and juries here, made it long be considered as the law of the land, that an actual settlement gave a title. But when the judges of the Supreme court came here, this doctrine was over-set; and the law is now settled otherwise. Until those decisions of the judges of the Supreme court, our legis-

1793.

lators never thought of any precaution, to protect settlements against titles; because they thought it as impossible, that they could be hurt, as that the winds could sweep away the mountains. In the end of the year 1786, I brought forward the law, which has ever since been continued in force, to protect settlements. I consulted the judges, to know whether they would permit evidence of improvement against title. They said no: our system is otherwise. The earliest title must hold. But this is not a case of settlement. It is not a claim of 300 acres, but of 900, three times a reasonable claim.

PRESIDENT. The full extent of the claim of old *Milliron*, an early settler in this country, is but a reasonable provision for himself and his family of sons; and ought to be protected if possible. The disputed land is contiguous to the house, and such as would naturally be chosen as part of the place. If the plaintiff's survey had been regular, we should have thought ourselves bound by former decisions, to say, that the title is in the plaintiff. But, as the survey is void, you may perhaps consider yourselves as standing in the situation of the board of property; and give such decision by your verdict, as the board would have given, if the case had come before them.

The jury found a verdict for the defendant.

NOTE.—I have since understood, that it has been decided, by the judges of the Supreme court, that the act of 8th April, 1785, extends only to the *new purchase*, the land proposed by that law to be sold. If so, the point, on which this case was put to the jury, was wrong. But it has since been determined by judges of the Supreme court, that, under the act of 26th March, 1785, and other acts giving sanction to improvements or settlements, evidence of improvements or settlements, without office titles, might be given. And in the case of *Wells v. Wright*, in *Washington* county, at a court of Nisi Prius in May, 1793, it was held, that a warrant taken out by one man, for the actual settlement of another, before the law of December, 1786, was void.

WILLIAM GRAHAM v. WILLIAM GOUDY.

THIS was an action of *indebitatus assumpsit*, for money laid out and expended, for money had and received, and for money due on an *insimul computassent*.

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Goudy, for value received, had, before it was due, which was in *May*, 1795, assigned to *Graham* a bond, on one *Neily* and one *Emerson*, who, in *March*, 1795, went down the river. *Neily* never returned publicly. In *July*, 1795, there was judgment against *Emerson*, on this bond, a writ of enquiry, and final judgment for 21*l*. *Emerson* knew, that *Neily* had directed one *Smith*, to pay the bond assigned to *Graham*; and understood from *Graham*, that he had given up the bond to *Smith*, on whom *Emerson* had a bond; and saw *Smith* have the bond. In consequence of this, *Emerson*, who was only a surety, had given up to *Neily* property, which he had got from him to discharge the bond. There was some proof, that, when this bond was assigned, *Graham* had his choice of other bonds, and preferred this. And, in conversation, *Goudy* told *Graham*, to take care, as that bond was now gone from him. *Emerson* being insolvent, the present action was brought by the assignee against the assignor of this bond.

Brackenridge and *Young*, for the defendant. This is not a negotiable paper, the indorsement of which renders the indorser liable to the indorsee, on failure of the drawee. If it were, not using due diligence, or giving credit is equal to a payment, and discharges the indorser. The failure of payment, in this case, arose from the conduct of *Graham*, who deceived *Emerson*, by giving the note to *Smith*, a debtor of his. *Graham* has also delayed a long time. There is no evidence of what the consideration was, whether 21*l*. or only 5*s*. and so there is no certain measure of damages. And there is evidence, that *Graham* was to run the risk.

Ross and *Woods*, for the plaintiff. This action lies for money paid by mistake, or for a consideration which happens to fail; for money got through imposition, express or implied; or where undue advantage is taken of the plaintiff's situation; it lies in all cases where the defendant has money, which, in equity and good con-

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science, he ought not to retain. This is not a negotiable paper; nor is this action brought as if it were.

PRESIDENT. The recovery is put on two grounds:—

1. Imposition or fraud;
2. The consideration happening to fail.

1. Fraud is not to be presumed, and has not been proved. If the circumstances were equally in the knowledge of both, and the assignee took the risk, he must bear the loss.

2. If the transaction was fair, and if the consideration failed through the negligence of *Graham*, he must bear the loss. It does not appear, that the consideration, for which value was given, was an undertaking that the bond should be paid, but an assigning of the bond. If there had been an undertaking by the assignor, and reasonable diligence by the assignee, the assignor would have been liable.

The jury gave a verdict for 20*l*. But, on motion, this verdict was set aside, because there was no proof of fraud, or express promise to be answerable for the payment of the money; and because *Graham's* negligence and trafficking with *Smith*, after the bond was due, and want of notice or demand on *Goudy*, is sufficient to counterbalance any presumption that can arise out of the case, in favour of *Graham*.

It was never tried again.

GARRET CAVODE and NATHAN WILLIAMS v.
WILLIAM M'KELVEY.

THIS was an action of *indebitatus assumpsit*, for money had and received.

One *Sterret* purchased, for 2*q*s. 6*d*. at commissioners' sale, the claim of one *George Knox* to a tract of land in *Westmoreland* county, and sold it, for 50*l*. to *M'Kelvey*; who sold it to *Cavode* and *Williams*, for 120*l*. of which 50*l*. was paid to *Sterret*, and 70*l*. to *M'Kelvey*; and they bound themselves to warrant and defend, according to the sums respectively received.

Knox's claim was on a location of 25th July, 1769, on which no survey had been made, till after *Cavode* and *Williams* had purchased from *Sterret* and *M^cKelvey*. Before that time, the land, for which *Knox* had applied, (except 129 acres worth 5s. per acre, which, after their purchase, *Cavode* and *Williams* surveyed on *Knox's* location) had been all surveyed on two warrants to one *Fechter*, and one *Hammel*, from whom *Cavode* and *Williams* purchased. *Sterret*, after his purchase from the commissioners, having entered a caveat against the surveys of *Fechter* and *Hammel*, on the ground, that *Knox's* location was an elder title, *Cavode* and *Williams*, alarmed at this, to secure themselves, purchased *Knox's* claim from *Sterret* and *M^cKelvey*. But afterwards, conceiving *Knox's* claim bad, as against *Fechter's* and *Hammel's*, they brought this action to recover back all the money paid to *M^cKelvey* (the remaining 129 acres, at 5s. per acre, amounting only to 32*l.* 5s. and so not to 50*l.* paid to *Sterret*).

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Woods, for the defendant. Compromise of a doubtful title is a good consideration. Money paid voluntarily, if it may be retained with a good conscience, shall not be recovered back, although the payment of it could not have been compelled by law.

Cann v. Cann
cited 1 *Atk.* 10.
2 *Burr.* 1012.
Dall. 148.

Brackenridge, for the plaintiff. The small sum of 29s. and 6d. paid for *Knox's* claim, at commissioners sale, is so disproportionate to 120*l.* paid by *Cavode* and *Williams*, that there is intrinsic inconscionableness in the bargain, sufficient to raise a presumption of fraud. The plaintiffs must have been over-reached by the address of *Sterret* and *M^cKelvey*. The land sold by *Sterret* and *M^cKelvey* to the plaintiffs was, before that sale, the property of the plaintiffs. *Knox's* title was void. And *Cavode* and *Williams* got nothing for the money they paid to *Sterret* and *M^cKelvey*. It was paid without consideration, and must be recovered back.

PRESIDENT. In *assumpsit* on a wager, "whether a decree in the court of Chancery would be reversed, on appeal to the house of Lords," it was contended, that the event was not contingent, but certain; for the law is clear, evident, and certain. But it was held, that the consideration was good, and the action lay. Settlement of a dispute is part of the consideration in this case, and

Corup. 37.
Lofft. 383.
1 *T. Rep.* 60.

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seems to be the principal consideration in the view of the parties : that has not failed. There appears no fraud, nor concealment of circumstances, not equally in the knowledge of both parties.

There was a verdict for the defendant.

HIGH COURT

HIGH COURT OF ERRORS AND APPEALS,

At Philadelphia, July Term, 1793.

JAMES LACAZE, MICHAEL MALLET, and JOHN
ROSS, plaintiffs in error, v. State of PENNSYL-
VANIA, for the use of LOUIS LANOIX.

AN information had been filed in the Supreme court of this state, by the attorney general, in behalf of the Commonwealth, in debt, against *Lacaze, Mallet, and Ross*, for the penalty of a stipulation entered into, by the plaintiffs in error, in the court of Admiralty of *Pennsylvania*. The Attorney General informed, that, on the 24th *October*, 1783, *Lacaze* and *Mallet* exhibited a bill to the judge of the court of Admiralty of *Pennsylvania*, setting forth, that five barrels of silver coin, amounting to 5285 *French* crowns, and 1580 dollars, saved from the wreck of a brigantine, and, on the suit of the master, taken by process of that court, into the possession of its marshal, was the property of *Louis Lanoix* of *Bourdeaux*, that they were his agents, and that the coin ought to be delivered to them, to be transmitted to him; and that, upon this bill of *Lacaze* and *Mallet*, the judge of Admiralty decreed, that this coin, after deducting all costs and charges, for saving it from the wreck, and prosecuting the several claims in that court, should be delivered to them, on account of *Lanoix*, the right owner, that it might be remitted to *Lanoix*, agreeably to the tenor of their bill, they giving caution for the performance of the trust reposed in them agreeably to the practice and usage of that court, and the laws of this Commonwealth; that, in consideration thereof, *Lacaze, Mallet, and Ross*, afterwards, on 4th *November*, 1783, appeared before the judge of the court of Admi-

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ralty, and stipulated and acknowledged themselves to owe and be indebted to this Commonwealth, in the sum of 4000*l.* sterling, equal in value to 6666*l.* 13*s.* 8*d.** to be paid to the said Commonwealth, in case *Lacaze* and *Mallet* did not well and faithfully perform the trust reposed in them respecting the said coin, or should fail to indemnify the said judge, and the officers of the said court, against all persons lawfully claiming the same, and against the claim of *Lanoix*. The attorney general further informed, that the marshal of the court of Admiralty, afterwards, on 6th *November*, 1783, by command of that court, after deducting all costs and charges, delivered 1580 dollars, and 6330 crowns to *Lacaze* and *Mallet*, to be delivered forthwith to *Lanoix*. The attorney general further said, that *Lacaze* and *Mallet* did not perform the trust reposed in them respecting this coin, and did not, nor did either of them, remit this coin to *Lanoix*, whereby action accrued to the Commonwealth, to demand and have, of *Lacaze*, *Mallet*, and *Refs*, the sum of 4000*l.* sterling, equal in value to 6666*l.* 13*s.* 8*d.* which they, though required on 1st *July*, 1786, had not paid.

To this information the defendants in the Supreme court, pleaded payment; and, on trial, a verdict was found against them, that they did owe 3768*l.* 9*s.* 7*d.* and did not owe the residue 2898*l.* 4*s.* 1*d.* Judgement was given in the Supreme court, on this verdict; and the record being removed by writ of error, into the high court of Errors and Appeals, the general errors were assigned.

It was argued, at *July* term, 1792, by *Moylan*, *Misflin*, *Ingersoll*, and *Lewis*, for the plaintiffs in error; and by *De Ponceau*, *Coxe*, *Sergeant*, and *Rawle*, for the defendants in error. The arguments lasted three days; and a vast collection of authorities was stated. The judges took to this term, to consider the case; and now, in delivering their opinions *seriatim*, went over the arguments and authorities on both sides; and affirmed the judgment of the Supreme court.

CHEW, PRESIDENT. The counsel for the plaintiffs in error, in their arguments before us, have contended,

* It should be 6666*l.* 13*s.* 4*d.*

that the judgment of the Supreme court is erroneous, and ought to be reversed for various reasons.

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1. Because, the Admiralty being a court of inferior jurisdiction, the declaration does not aver (as by the rules of law, they say, it was essentially necessary) that the subject matter, of which the court of Admiralty took cognisance, was *infra jurisdictionem* of that court.

Much time was taken up, and many cases cited on the question whether the Admiralty is, or is not, a court of inferior jurisdiction; and, although I incline to think, on considering this point, that it is to be classed among the inferior courts, it appears to me, circumstanced as this case is before us, to be totally immaterial for us to decide upon it, because it appears, on the face of the record, that the Admiralty had passed sentence, and that the security taken in that court, which is the ground of the present action, was for the performance and carrying into execution that sentence; and I conceive, that, if the proceeding in the Admiralty was ever exceptionable, on account of the want of jurisdiction, the proper time to take advantage of it legally, was by application to the courts of Law for a prohibition to the court of Admiralty, while the cause was *there depending and before sentence*. But, as sentence in this case had passed in the Admiralty, we are, in my opinion, as a court of Law, precluded from calling in question the jurisdiction of the Admiralty; but, on the contrary, must presume, and take it for granted. It is now too late to examine into it. I ground my opinion on this point, on numerous adjudged cases, ancient and modern, where motions have been made to the courts of *Westminster* for prohibitions to the Admiralty and Spiritual courts, on suggestions of their not having jurisdiction; and, in all the cases I have met with on the subject, the judges have universally held, that there is a great difference between an application made to them for a prohibition pending the suit and after sentence. In the first case, pending the suit, the court will examine the whole case, and see the ground of the proceeding in the Admiralty or Spiritual court; but that the rule is quite the reverse after sentence is passed; in such case they will not look out of the proceedings, for the party who applies for a prohibition must shew a nullity of jurisdiction clearly on the face of the proceed-

1 *Burr* 17,
313. 1 *Str.*
187. *Corp.*
423-4. 2 *T.*
Rep. 472, 694
3 *T. Rep.* 5.
4 *Burr.* 2035.

1793. } ings. I could cite a great number of cases to shew this to be a settled and established rule.

But even if it is admitted, that the declaration was defective, for not averring, that the cause was *infra jurisdictionem* of the Admiralty, it is clear to me, that the defect is cured by the verdict. The case of *Bull v. Steward* is in point. It was an action on the case against the defendant, bailiff of the Borough court of *Southwark*, for an escape of *Alice Rawlins*, on *mesne* process, and a verdict for the plaintiff. On motion in arrest of judgment, it was objected, that the declaration did not alledge in what manner *Alice Rawlins* was indebted to the plaintiff, but only, in general, that she was indebted. It might be on a judgment, or such a debt as that court had no jurisdiction of, nor does it appear, that the cause of action arose within their jurisdiction. To this it was answered, and *resolved by the court*, that this being *after* verdict we will suppose every thing proved at the trial, which was necessary to be proved, and that the cause of action arose within the jurisdiction, unless the contrary could be made appear on the face of the record. Judgment was given for the plaintiff.

Cartb. 304. On error in the case of *Alston v. Buscough*, the case was thus. Debt was brought on the statute, 2 *Ed.* 6, of tythes, wherein the plaintiff demanded the treble value; and on *nil debet* pleaded, the plaintiff had a verdict. The error assigned was that the declaration was ill, in not alledging, that the defendant had carried away the corn without making an agreement for the tythes; for the statute gives the penalty only where the tythes are carried off without any agreement for so doing, therefore, if the defendant had agreed with the plaintiff for carrying off the corn without setting out the tythes, as it doth not appear but he might, then it had been no forfeiture. And the court was of that opinion, to wit, that the declaration was ill for the above reason, *if it had been upon a demurrer*; but this was helped by the verdict, for if there had been any agreement proved at the trial, the plaintiff could not have obtained a verdict.

Sr. T. Ray,
487. The case of *Hutchins v. Stevens*, was debt for rent against the lessee, brought by the grantee of the reversion. *Nil debet* was pleaded, and there was a verdict for the plaintiff. It was moved in arrest of judgment

that the plaintiff had not alledged in his declaration, that the defendant did ever attorn to the plaintiff's grant of the reversion. Resolved good enough after verdict. For it is apparent, if the plaintiff had not given the attornment in evidence, he must have been nonsuited; and wheresoever it may be presumed, that any thing must of necessity be given in evidence, the want of mentioning it in the record will not vitiate it after a verdict. And so judgment was given for the plaintiff.

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In the case of *St. John v. St. John*, the plaintiff brought debt for 40*l.* against the defendant, bailiff of *Stockbridge*, on the stat. 21 *Hen.* 6, for not returning him burgesses of the said town to the last parliament. The statute directs that the sheriff shall send his precept to the mayor, but, if there be no mayor, then to the bailiff. The plaintiff declared that the sheriff had made his precept to the bailiff, without averring that there was no mayor. And, after verdict for the plaintiff, this was moved in arrest of judgment. But the court was of opinion clearly, that it was good, for *we shall not intend, that there is a mayor, unless it be shewed; and, if there was one, it should come properly on the other side.* *Hob. 73.*

These cases, but more pointedly the last, apply to another objection, which was, that the declaration does not aver, that *Lanoix* was the owner of the silver coin, and prove, that, if he was not, it should have come properly from the other side.

2. The plaintiff's counsel object, that it appears on the face of the record, in this case, that the subject matter before the court of Admiralty was wreck. That wreck is of common law, and not of Admiralty jurisdiction. Consequently, the whole proceedings of the Admiralty, in this case, were *coram non judice*, and, *ipso facto* void.

Admit the fact to be as stated by the counsel for the plaintiffs in error, that it is apparent upon the record, that the subject before the court of Admiralty was wreck, in the legal and technical sense of the term; and they are certainly right in their conclusion.

It may not be improper here to define the term wreck, and consider in what respects it differs from flotsam, jetsam, and ligan.

Wreck, in its legal signification is confined to such

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Flotsam is when a ship is sunk or otherwise perishes, and the goods float upon the sea.

Jetson is when a ship is in danger of being sunk, and, to lighten the vessel, the goods are cast into the sea.

Ligan is where the goods so cast into the sea are so heavy, that they sink, and the mariners tie a buoy or something to them, so that they may find them again.

No goods of the three last descriptions, that is flotsam, jetson, and ligam, can be called or deemed wreck, so long, as they remain *on the sea*; but if they are cast on the land by the sea, they *then*, and not till then, become wreck, and are undoubtedly subject to the jurisdiction of the common law courts only. But if they are taken up at sea and brought on shore, I take it to be clear, that the court of Admiralty, and not the courts of Common Law, have the jurisdiction.

Molloy 241.

B. 2, c. 5.

5 *Co.* 106-7.

2 *Inst.* 167.

4 *Inst.* 134-5.

3 *Comm.* 106.

To support this objection then, it was incumbent on the plaintiff's counsel to shew clearly on the face of the record, that the subject matter in the court of Admiralty was goods cast on the land by the sea, and I confess, on the most attentive consideration of the record, I can see nothing in it, to warrant the objection. The word wreck, it is true, is repeatedly to be found in it; but it is as often applied to the *ship only* out of which the silver coin therein mentioned was saved, never to the coin itself. But let the record speak for itself. The petition of *Lacaze* and *Mallet* to the judge, sets forth, that five barrels of silver coin, the property of *Lewis Lanoix*, merchant in *Bourdeaux*, for whom they say they were agents, had then lately been saved from the wreck of the *Brigantine, Count Durant*, whereof *Anthony Fourné* was master, and upon whose libel or suit, in the same court depending, the process had issued, had been taken into custody of the marshall of the said court; and the petition concludes with praying, that the said coin should be delivered to them, in order that the same might be remitted to the said *Lanoix*, agreeably to the tenor of the petition, they giving caution for the performance of the trust reposed in them, agreeably to the practice and usage of the said court, and the laws of the Commonwealth. And caution having been afterwards given agreeably to

the decree, we find on the record, that the marshall returns, that by virtue of the writ of the same court, commanding him, after deducting all costs and charges for saving the said silver coin from the wreck aforesaid, &c. to pay over and deliver the same to *Lacaze* and *Mallet*, and that he did pay over and deliver the same accordingly.

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This being a state of the whole record before us, so far as respects the proceedings in the Admiralty, justifies the observation I before made, that the word "wreck," mentioned in the record, is applied to the brigantine *Count Durant*, and not to the silver coin saved out of her. All that can fairly be collected then from the record is, that the vessel from which the silver was saved, had been *wrecked*, not that *the silver saved out of her*, which the court held plea of, was "*wreck*," in its technical meaning, that is, thrown by the sea on the land. But *non constat*, by the record, where the brigantine was wrecked, that is, lost or perished. A vessel ship-wrecked at sea, may, in common *parlance*, with strict propriety be said to be wrecked, and, for any thing that appears to us on the record to the contrary, that might have been the case here. The fact however is not ascertained. To maintain the objection, the plaintiff's counsel ought to shew beyond a doubt, from the record, that the *coin was wreck of the sea*. To infer it, because the brigantine, out of which it was saved, is only stated generally to have been wrecked, is by no means sufficient. This objection, therefore, is in my opinion unfounded.

3. It is objected, that, if the Admiralty had jurisdiction of the subject, and the caution or security there taken was right and proper, yet it belongs to that court *exclusively* to proceed upon it, and to enforce their own sentence, consequently no action can be sustained, on the caution so taken, in a court of common law.

In support of this objection, the plaintiff's counsel have cited and relied on several authorities, which I have looked into and considered, the principal of which I shall notice.

The case of *Smart v. Wolf*, was cited. But this was 3 T. Rep 338; a case of prize, and I will observe once for all, that there can be no doubt, agreeably to the rule laid down in all

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Doug. 59.
4 T. Rep. 382.
Carth. 476.]

our law books, but that the court of Admiralty, in all prize causes has the sole and exclusive jurisdiction, and the Common Law courts cannot interfere, or give relief, or, in this particular case of prize, enforce the judgment of that court. In prize causes, and every incidental and consequent proceeding therein, the Admiralty has sole and exclusive jurisdiction.

H. Bla. 164.

As the case of *Brymer v. Atkins*, seemed to be an authority on which the plaintiff's counsel more particularly relied, I will give a short state of it. A vessel and cargo had been condemned as prize, in the court of Admiralty at *Halifax*. An appeal was made from that sentence to the lords commissioners of Appeals in *England* by the claimants, and security was taken in *Halifax* from the captors in the strict form of a recognisance, that if that sentence was reversed, the vessel and cargo, or their value should be restored to the appellants. The court of Appeals reversed the sentence of the court of Admiralty at *Halifax*, and were proceeding, on the security so taken, to enforce the performance of it. This case came before the judges of the Common Pleas, on a motion for a prohibition to the court of Appeals, and one of the principal grounds urged for the prohibition was, that the security was in the form of a recognisance, which the Admiralty, not being a court of record, had no right to take. But the judges refused to grant a prohibition, and construed the security, though irregularly taken in the form of a recognisance, to be a stipulation and undertaking to restore the vessel and cargo, if the court of Appeals reversed the sentence: and in the conclusion of their judgment on this point, they add, "The security, therefore, operating as a stipulation, execution of it belongs to that court and that jurisdiction, to which the parties have agreed to submit."

The observation I make on this case is, that it was a prize cause, in which the judges were solicited to prohibit the court of Appeals, a prize court, from enforcing the sentence of the inferior prize court. The law being established, as I have shewn, that, in all cases of prize, the jurisdiction was solely and exclusively in the Admiralty, the judges were right, in determining, that the execution, in this case, belonged to the Admiralty or prize courts. The rule they lay down is not a general

one. It settles the point respecting prize causes, but goes no further. The judges apply the rule to that particular case only; no other was then in question before them. The case therefore fails in giving one satisfaction on this subject; and the question still remains, whether the courts of common law, in other cases, cannot hold plea of securities taken in a court of Admiralty. It is to be lamented, that no case decisive of this question is to be met with, and that we are left to gain what information we can from cases which seem to have some analogy to this. And I find a great variety, where such actions have been sustained on judgments and proceedings in inferior and other courts.

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Thus debt was brought in the court of King's Bench, on a judgment in the sheriff's court of the county of York; so on a judgment in the sheriff's court of the city of London. Debt lies on a statute staple; and on a recognizance in Chancery. Debt lies for an amercement or fine in a court Leet; and for a fine in admitting a tenant in the lord's manor court; and it lies on a judgment of nonsuit in an inferior court.

In most, if not all, of these cases, although the courts of Westminster could not take original cognizance, or hold plea, in the first instance, of the causes of action, which arose in the inferior courts, yet it is clear, that an action of debt may be brought there, to enforce and carry into execution their transactions; and, considering the Admiralty as an inferior court, I can see no reason, that carries full conviction to my mind, the case of prizes excepted, why the same might not be done as well on securities taken in the Admiralty court, as in the cases above referred to. But, supposing this on the whole to be a doubtful point, for my own part, I should not hold myself justifiable, in reversing the judgment of the court below, unless I could lay my hand on my heart, and say, I am fully satisfied, the court was wrong and mistook the law, which I cannot say with a good conscience upon the present question. It would not be sufficient to urge, that I have doubts upon it; I must be convinced, beyond all doubt, their judgment was erroneous, before I take upon me to pronounce it to be so.

Robison's Entries, 183.
232. *Hansford, 8c.*
Vidian 123.
Cro. El. 356.
465, 544.
Hansford 81.
Vidian 127.
Co. Ent. 118.
Cro. El. 608.
Lev. Ent. 62.
Rafal 144.
553. *Vidian*
112, 119, 132.
3 *Lev. 206.*
Sir T. Ray,
68. *Cro. El.*
581. *Buller,*
167. *Esp.*
238.—*Cliff's*
Est. 244.
1 *Wils. 316.*

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3 *Wils.* 348.2 *Bla. Rep.*
838.1 *Burr.* 642.

The case of *Morris v. Rees*, was cited by the plaintiff's counsel, in which it was adjudged, that a suit by the assignee of a bail bond must be brought in the same court where the original action was laid.

In the fullest report of this case, the reason assigned by the judges is that the court where such action was brought is empowered to give general relief to the plaintiff and defendant in the original action, on equitable terms, which no court can properly do, but that in which the original action was brought. The reason here given is peculiar to the special case of a bail bond, and does not affect the case before us. And there is one case, and but one, that I have met with, where it was resolved, that a bail bond could be sued in another court. It is the case of *Chesterton v. Middlehurst*, where a bail bond given in the court Palatine of *Chester*, was sued in the King's Bench. The defendant filed special bail below, then moved to set aside the proceedings.—The court held the bringing the action there to be unfair, unless there were special circumstances to warrant it, as the defendants being out of the jurisdiction, which was not pretended to be the case; and the court resolved, that the plaintiff ought to have proceeded in the court below, and accordingly set aside the proceedings in the King's Bench.

But it is said, if this practice is admitted, it will make the lands of the security liable to the payment of the money forfeited by the non-performance of the stipulation; which would not be the case if the stipulation was left to be enforced by the Admiralty, as that court could not legally touch the real estate of the parties; that the stipulation bound them personally, but a judgment in a court of common law would affect their lands.

It not having been proved, that the Admiralty, in the present case, had an exclusive jurisdiction, this objection can be considered only as *argumentum ab inconvenienti*.

But the same objection, if of weight, would lie in several cases that have been mentioned in answer to it.—Thus on a judgment in a foreign country which does not bind land by their laws, debt, or *assumpsit* will lie in *England*, where the judgment upon it is a lien on the defendant's real estate. On a judgment in *England*, only the moiety of the lands can be extended on an *elegit*,

and retained by the plaintiff no longer than he is satisfied his debt and costs from the rents and profits ; yet debt will lie in this state on a judgment in *England*, and the lands which the defendant holds here be taken in execution, and the fee simple sold by the sheriff under our laws. So on a judgment in one of the *American* states, *Virginia*, for instance, on a contract made there, where lands are by law not liable, and consequently were never in the idea of the parties as subject to be executed and sold to satisfy the debt, an action of debt will lie here, and the judgment thereon will be a lien on the land of the defendant. To an amercement or fine in a court Leet, it has been determined, that a distress is incident, which can be made on the goods, but not the lands of the person amerced. No other remedy can be pursued in a court Leet. Yet debt for the amercement will lie in *Westminster Hall*, and lands extended on the judgment.

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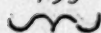
1 Roll. Ab.
665.
Sir T. Ray.
68. *Cro. El.*
531.

These cases are to me full answers to this objection. In all of them a species of property is subject to the second judgment, which was exempted in the first.

Another objection is, that Mr. *Rofs* was only collateral security, for *Lacaze* and *Mallet*, to the Commonwealth, and, if responsible at all, in a common law court, no action of debt will lie against him, but the proper and legal remedy was an *indebitatus assumpsit*, on the special agreement.

But how is it made out, that Mr. *Rofs* was only collateral security for *Lacaze* and *Mallet* in this case ? Take a summary view of the transaction. The court of Admiralty was in possession of a large sum of money, for which the judge was ultimately accountable to the right owner, whoever he might be, on his appearing and proving it to be his property. It was then his duty, as well as interest to take care that he did not part with it improperly. *Lacaze* and *Mallet* come into court as volunteers, and inform the judge that the money is the property of *Louis Lanoix*, a foreigner residing at *Bordeaux*, for whom they say they were agents and transacted business, but from whom they do not pretend to have any power or authority to demand or receive this money, and pray the judge to put them in possession

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of it, in order that they might remit it to the said *Lanoix*. The judge prudently and cautiously, I think, refuses to deliver the money to *Lacaze* and *Mallet*, unless they will procure one or more persons to undertake with them for the money's being remitted. Mr. *Ross*, on this, steps forward, and becomes bound to the Commonwealth in the penalty of 4000*l.* sterling, jointly with *Lacaze* and *Mallet*, that they should remit the money, and, on the joint credit of them all, the money was afterwards delivered accordingly by the judge's order.—The case thus circumstanced, there is no legal ground on which Mr. *Ross* can be considered as collateral security in the engagement. It may with great propriety be said, that, in the relation which subsists between Mr. *Ross*, and *Lacaze* and *Mallet*, he was their security, but as between the Commonwealth and *Lacaze*, *Mallet*, and *Ross*, they, from the nature and terms of the contract and undertaking, are all three clearly in my opinion principals, and, as such, answerable to the Commonwealth for the non-performance of it; and, it being an express contract, debt may be brought upon it agreeably to the settled rule of law, that an action of debt will lie, when the sum or duty is certain and fixed.

My opinion is therefore that the judgment of the Supreme court be affirmed.

BIDDLE, J. Delivered his opinion, also at length, that the judgment of the Supreme court ought to be affirmed: because the stipulation was to be then presumed to have been taken judicially, in a subject within the jurisdiction of the court of Admiralty, and, as such, a good ground of an action of debt at common law. The death of that worthy man, sincerely regretted by all who knew him, has disappointed my hope of being able to lay his argument before the reader.

RUSH, J. On the trial of this cause below, there was no doubt upon the merits; and accordingly the jury found a verdict for *Lewis Lanoix*, the plaintiff, upon which there was judgment. The record being removed into this court by writ of error, a number of reasons have been urged for reversing the judgment.

If the stipulation be in every respect, and in every view of it, a void act, it will put an end to the controversy. It is proper therefore to begin with this objection.

The maxim, that consent cannot give jurisdiction, 1793. seems to be a principle of universal jurisprudence; and must naturally take place in every country, where tribunals are instituted with a gradation of powers. If the parties of their own choice, could leave behind them inferior courts, and, by mutual agreement, resort, in the first instance, to the highest tribunal, it would effectually confound the limits prescribed to different jurisdictions, and frustrate the view of the legislator in drawing lines of division among them. This idea shows the reason and the extent of the rule. It cannot therefore apply, where any instrument is acknowledged before a court or magistrate by the voluntary consent of a *single* person. For in *this* case the act of an *individual* has not the least tendency to defeat that system of subordination and distribution of authority among the various courts, on which the judiciary establishment is founded.

Upon this principle it is, of a voluntary jurisdiction, by an individual, to use the expression of chief justice *Hale*, that a justice of the peace may take a voluntary recognisance or information, out of his proper county; for though he has no jurisdiction there, and it may therefore be said to be *coram non judice*, it will bind the party, being a voluntary act. On the same ground, it has been held, that a voluntary bond, given in the Spiritual court, by mistake, which they had no right to take, and was void there, was binding at common law. And where executors have been led into a mistake, and gave bail upon a writ of error, which the law did not require, the court refused to discharge the recognisance, and held it good, at common law.

2 Hale 91.

2 Hawk. 37.

3 Cro. 212-3.

Folkes v. Doc-

minique, 2 Str.

1137.

Johnson v.

Laferriere, 2 Ld.

Ray, 1459.

These are acts, to use again the expression of lord *Hale*, of voluntary jurisdiction in an individual, by which the authority of no court is injured or eluded; and which, therefore, are considered as obligatory upon the principles of the common law or common justice.

The case of *Brymer v. Atkins* does by no means contradict this position. It was an adversary suit in the Admiralty, in which the appellee, by mistake of the officer had entered into a *recognisance*, instead of a stipulation, to restore the full value of the vessel and cargo, in case the decree should be reversed. The court were

H. Bla. 164.

1793. clearly of opinion, though the security had been entered in the form of a recognisance, it should operate as a stipulation, and that the Admiralty alone could compel execution upon it. But why, I ask, could the Admiralty alone compel execution upon this stipulation? For this plain reason, that interlocutory securities, by way of stipulation, on points arising in the usual course of business, are incident to a court of Admiralty; and the stipulation by the appellee was evidently of that nature. A prohibition was *refused* to a suit in the Admiralty, upon a stipulation made by order of the court, in a cause of which they had cognisance; though the stipulation was collateral and extrajudicial as to the main question; because it was taken according to the *usual course* of the court. The idea is this: wherever the stipulation is taken agreeably to the *usage* and *practice* of the court, in any stage of a cause of which they have *cognisance*, it can only be sued in the Admiralty. But if entered into *voluntarily*, for some *extrajudicial* object having no connection with, or relation to any *existing* cause; such stipulation cannot be sued in the Admiralty; because the court had no right to take it agreeably to their own usages.

1 *Ker. 32.*

Of this latter kind I consider the stipulation entered into by Messrs. *Ross*, *Lacaze*, and *Mallet*. I hold that the taking it was an act unauthorised by the *usages* of the Admiralty, and wholly unprecedented, having no connection with, or relation to the cause then before the court; and that the stipulation may so far *be* said to be void, and *coram non judice*, that the parties were never amenable thereon in a court of Admiralty. This brings us fairly to the question.

Is a voluntary security, taken by a court or judge, for an honest and lawful purpose, upon which no redress can be had in the *same* court for want of jurisdiction, so far a *nullity*, that a suit cannot be maintained upon it in any other court? And I apprehend clearly it is *not*. The case of *Folkes v. Docminique*, cited before, seems to be in point. It is so briefly stated, according to the custom of the reporter, as to admit of explanation.

2 *Str. 1137.*

The statute 21, *Hen. 8*, c. 5, authorises the Spiritual courts to grant letters of administration, taking security however for the true administration thereof. After this,

the statute 22 *Charles*, 2, c. 2, directed the Ordinary, upon granting letters of administration, to take bonds from the administrator with sureties for his faithful administration according to law. An administrator with the will annexed, *during the minority of an executor*, happened to give an administration bond in the Spiritual court, conditioned to return an inventory, to pay debts and legacies; and it became a question afterwards, whether the administrator could be compelled at law to pay a legacy in a suit brought by a legatee upon the bond. The court lay down the position, that administrations of this kind, during the minority of an executor, are not within the statute of *Hen.* 8 ch. 5, and that the administrator was consequently not obliged to give bond for the due administration of the estate: nevertheless they gave judgment against him, and made him pay the legacy.

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This administration bond was therefore so far *coram non judice*, that the party was not obliged to give it, and the court had no right to require it. Here then we see a voluntary security, given for an honest and lawful purpose, on which no suit could ever have been maintained in the court that took it (for the Spiritual court cannot hold plea of debt upon bond) nevertheless afterwards established against the party in a court of common law. In one circumstance, this case goes beyond that now in contemplation of this court. It might be said, the bond was given by mistake; but the stipulation was notoriously given by the parties with *their eyes open*.

I conceive it to be the general rule of law, that common law securities, taken in one court, may be sued in another. So we find several instances of recognisances taken in Chancery being sued at common law, and no objection ever made to it. And it is merely for the sake of convenience, *not* that the principles of law require it, that the courts of *Westminster Hall* have, of late years, adopted the resolution of not permitting bail bonds to be sued in any *other* court than that, out of which the original process issued.

2 *Com. Dig.*
634.

1 *Med.* 29.
Cro. E. 608.

1 *Bur.* 642, 3.
Burr. 1923.

In my view of this cause, the doctrine of wrecks has nothing to do with it. For, whether the Admiralty had jurisdiction or not upon the libel filed by the captain for salvage, is entirely out of the question. Let this point

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be as it may, the interest of *Lewis Lanoix* upon a collateral ground, cannot be affected by it. Nothing can be more unreasonable, than upon the present controversy, between *Lanoix* and the plaintiffs in error, to call upon *Lanoix* to shew, that the Admiralty had jurisdiction, on a suit brought by the captain against the property of *Lanoix*. The very idea is pregnant with injustice and oppression. Is *Lanoix* to be responsible for the consequences of the captain's suit in the Admiralty, if they had not jurisdiction? Is it right, is it just, that he should be stripped of his property to the amount of thousands, because a third person, without his orders or knowledge, may have gone into a court of Admiralty, and illegally filed a libel? Upon the supposition, that the court had no jurisdiction, it would be repugnant to every principle of law and justice, to suffer the plaintiffs in error to avail themselves of it, and thereby avoid their own voluntary act, to the great injury of an innocent third person.—Messrs. *Lacaze* and *Mallet* were never cited in the Admiralty. They were not parties to the suit depending there; they went voluntarily into court; and asked a favour, which was granted, on their engaging to do an act of justice, viz. to remit the silver to the right owner, whom they stated to be *Louis Lanoix*. The jurisdiction of the Admiralty is not the foundation of the present suit; but their going voluntarily into court, and entering into the stipulation, which will bind them, independent of every consideration respecting jurisdiction. The plaintiffs in error could not have been compelled to enter into any stipulation with regard to the silver then in possession of the Admiralty; but having done it of choice, and at their own request, the common law proceeding on those principles of integrity and fairness, which ought to be the basis of all laws, demands a strict and faithful compliance with their contract.

With respect to the objection, that the declaration recites the proceedings in the Admiralty, and that, therefore, it should appear from *them*, that the court had jurisdiction, I think the recital is surplusage. There was no necessity for it. The declaration would have been good, if it had only stated the stipulation, and the reasons of giving it. The proceedings on the libel by the captain, form no part of *Louis Lanoix's* title to the mo-

ney: the stipulation is the foundation of the demand. It is not the case of *setting* forth a title *defectively*, but a recital of proceedings immaterial, unnecessary, and superfluous. The declaration might have stated the decree in the Admiralty, the actual delivery of the silver, and the stipulation, omitting the recital of the proceedings on the libel by the captain; and I think there can be no doubt, it would have been good. We find these things are, in fact, stated; and they form the *real* title or ground of action set up by *Lewis Lanoix*. The case of *Ruston v Aspinall* cited at the bar, was an action by an indorsee against an indorser, of an accepted bill of exchange, and the declaration omitted to alledge two facts, viz. a demand upon the acceptor, and notice to the defendant of the acceptor's refusing to pay. The court held, the verdict did not cure these objections. Because the declaration upon the face of it, contained no ground of action, and no proof at the trial could therefore make it good; and not being laid, it was not requisite they should be proved. But in the case now before the court, the declaration states every thing necessary, and goes further and states what is superfluous.

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Doug. 654.

Suppose on a suit by an indorsee against an indorser upon a bill of exchange *not accepted*, the plaintiff should set forth in his declaration a demand upon the *drawer*, and notice to the *defendant* of the drawer's refusing to pay (which, it is settled, are not necessary in such case) can it be pretended, that inserting this unnecessary matter would destroy the right of the indorsee to recover from the indorser?

Heylen versus Adamson. 2 Burr. 669, 682.

It has been said, the declaration does not sufficiently state, that the silver was the property of *Lanoix*.

I do not see how it could have been otherwise set forth. It states that *Lacaze* and *Mallet*, in their memorial alledged it to be his property, that they were his agents, and as such apply to have it delivered to them, for the avowed purpose of remitting it to him. It then states the delivery of the silver, for the purpose aforesaid, and that the plaintiffs in error acknowledged themselves indebted to the Commonwealth in the sum of 6666*l.* 1*3s.* 8*d.* in case they did not perform the said trust reposed in them; and then it assigns the breach.

Besides, I do not conceive it to be material, in the

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Lee v. Edwards, 1 Lev. 230.

present stage of the business who was the owner. The plaintiffs in error might have shewn on the trial of the cause below, that *Lanoix* was *not* the owner. The verdict has ascertained the parties to the contract, and established the fact, that the silver was *never* remitted. It is therefore too late to alledge, that the silver might have belonged to somebody else. If this had really been the case, perhaps it would have been ground to have nonsuited the plaintiff, but is certainly no reason for granting a new trial or reversing a judgment.

It was further objected, that debt will not lie against the plaintiffs in error. I have already observed, that the stipulation should be considered in the light of a mere contract, and, as such, binding upon the parties, being a fair and honest engagement for the performance of an act in itself lawful and moral, and that it could be sued only at common law. The action is not brought upon *an instrument* of writing; nor is any instrument of writing declared on; but it is brought upon a contract to pay a fixed sum of money, and the agreement or stipulation before the judge of the Admiralty is *the evidence* of that contract. We cannot travel out of the record; and it does not appear from the record, that any written stipulation ever existed. We must, therefore, take it to be a parole contract; supported by parole evidence. It is a precise and positive contract by the three plaintiffs in error, and not by Mr. *Ross alone*, that the silver shall be committed to *Lanoix*. The question then is this:—Where three persons, say *A. B. and C.* own themselves indebted to *D.* in a specific and ascertained sum to be paid to the said *D.* in case *A. and B.* shall not perform a particular act, whether, if the act be not executed by *A. and B.* an action of debt will not lie against all three upon such contract.

This is exactly the state of the question before the court. Messrs. *Ross, Lacaze, and Mallet*, on the 4th of *November*, in the year 1783, acknowledged themselves to owe and to be indebted to the Commonwealth, in the sum of 4000*l.* sterling, equal in value to 6666*l.* 13*s.* 8*d.* currency, to be paid to the Commonwealth, in case the said *Lacaze and Mallet* did not faithfully perform the trust reposed in them respecting the said silver coin. They have not remitted the silver, and the

question is, will an action of debt lie against them all three.

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It is well known, an action of debt will lie, not only upon a bond, or bill, but on a note of hand, a special bargain, a parole lease, a parole contract, or a verbal bargain to pay a fixed price for a certain parcel of goods. In short, all the law requires to found an action of debt is, that the sum be fixed and determinate, for which the suit is brought. So where the contract is by parole, and depends upon a *condition*, it is equally clear, that debt will lie. As if a man promise to pay one 20*l.* if he will marry his daughter; an action of debt lies, without any specialty, if the marriage takes effect. It is brought to compel a specific performance of the contract: but an action of *indebitatus assumpsit* is to recover damages for the breach of it.

F. N. B. 120.

Lilly, 403.

3 *Bla. Com.*

154.

F. N. B. 120.

The case of *Stratton v. Rastal* was strongly urged on the part of the plaintiffs in error, to prove, that an action will not lie against Mr. *Ros* considered in the light of a security. The case there was an action upon an implied *assumpsit*, brought for money had and received to the use of the plaintiff, who, it appears, was the purchaser of an annuity, for the payment of which the defendant was bound as a security *with* the person who had granted the annuity. The bond and other writings executed to secure the payment of the annuity, became void by the plaintiff's neglect to register them; and the action was brought by him to compel the defendant, who was the security to refund the money. The court were divided in their opinion. *Ashurst* thought the plaintiff ought to recover. *Buller* and *Grove* were of a different opinion, upon good grounds; and held that the defendant was security for the payment of the annuity, not the repayment of the consideration; and that the plaintiff's own neglect to register the securities ought not to raise an implied *assumpsit*, whereon to charge the defendant, who had never received a farthing, and was not security for its being repaid.

2 *T. Rep.*

366.

In this case the defendant was *not liable*, by the very terms of the contract, for the repayment of the money. But in the case before the court, Mr. *Ros* is not held as a security, but is equally bound with the other two for the safe delivery of the silver, and is therefore clearly liable, by the express terms of his own contract.

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1 *Salk.* 23.*Hardr.* 486.1 *Mod.* 285.*Lev.* 1. *Ventr.**Keb.*1 *Ventr.*2 *Com. Dig.*
638.*Hart v. Long-*
fitt, 2 L. Ray
848.*Dingwall v.*
Dunster,
Doug. 249.*Ellis v. Ga-*
lindo, Doug.
250.

It has been objected, that debt will not lie, because Mr. *Ross* is only collaterally bound; and *Hard's* case was cited and relied on; where it is said debt will not lie against the acceptor of a bill of exchange, being but a collateral engagement; but that it will lie against the drawer, because he is a debtor by the receipt of the money. There is no doubt, the law has been so determined by an express adjudication in the Exchequer Chamber, in the 20th *Char.* 2. and that this decision has been recognized in the case of *Brown v. London*. It appears from this case, that in the case in the Exchequer, *L. C. Baron Hale*, though he concurred in the opinion, that *indebitatus assumpsit* would not lie against the acceptor of a bill of exchange, could not avoid saying, "The law ought to be otherwise;" and in *Brown v. London*, justice *Twissden* doubted, and conceived that debt would lie against the acceptor of a bill of exchange. After this, I hope I may be excused for observing, that the reasons and principles of the determination would scarcely bear the liberal discussion of modern times. Where the acceptor of a bill appears to have funds in his hands belonging to the drawer, can it be doubted that an action of debt would lie on the ground of an acknowledgement, that the acceptor had received and held money to the use of the plaintiff? Debt will lie where a person has paid money to *A.* for the use of *B.* by the *cestui que use B.* And whether he had funds or not, why might not an action of debt be maintained on the foot of an express *assumpsit* to pay a fixed and determinate sum, on behalf of a third person?

Nor is it true in fact, that the acceptance of a bill of exchange is a collateral engagement, to pay in default of the drawer. So far from it, that the acceptor is *first* liable, and must be first resorted to, and it is not necessary to shew notice to *him* of non-payment by any other person. And *Ashurst* lays down the same position with *Twissden*, that the acceptor makes himself the debtor. In conformity to this idea, it has been adjudged, that, where the holder of a bill received interest thereon from the drawer, or even a part of the principal, and a written assumption for the balance, the acceptor was not discharged even in these cases. So little countenanced by modern decisions is the notion, that the acceptor of a

bill is only collaterally bound for the payment of the money. 1793.

Let the law, however, upon this point be as it may ; for it is not necessary now to determine it ; debt upon an accepted bill is not like the case before the court. For Mr. *Ross* is bound, in the same manner, in the same terms, and to all intents and purposes, as firmly as *Lacaze* and *Mallet*; and we are to suppose, after verdict, the contract to be proved as stated in the declaration. As well might a co-obligor security pretend, that debt would not lie against him, in conjunction with the principals, because he had not *actually received* the money, and was only security for the payment of it.

Upon this subject, I take the rule to be, that, wherever the defendant, by the express *terms* of the contract, is only a guarantee on behalf of another, there debt will not lie against him, being only collaterally bound, but a special action on the case. But where he absolutely engages, and says *I will pay you*, there debt lies against him. And no doubt two or three persons may so contract, or bind themselves, to pay a certain and fixed sum, though one *only* receive the consideration, that debt will lie against them all. This principle is every day recognized by experience, where the contract is in writing ; and there is no reason why there should be a difference, where the contract is by parole, and to be void, in the event of two of them doing a particular act. 2 L. Ray 342.

Can it be said, in this case, that Mr. *Ross* is only guarantee ? Does he engage that if *Lacaze* and *Mallet* do not remit the silver, *he* will do it for them, or be responsible for the consequences ? By no means. If this were the case, I admit he would be only *collaterally* bound, and that debt would not lie against him. But the contrary is apparent, as we are now to suppose the contract to be proved as laid in the declaration : from which it appears, they are all principals, all equally and jointly engaged, one as much as the other. And certainly, they are not the less principals, because the *debt* might have been avoided, by two of them complying with the contract.

It has been objected, that sustaining this suit in a court of common law will render *lands* liable ; whereas, in the Admiralty, the *person* only can be imprisoned.

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This objection, it must be owned, is ingenious and refined. But surely the different *modes* of execution in the different courts can not destroy a subsisting *right of action* in either. *Lanoix*, like every other creditor, should have the utmost benefit of his suit in that court, in which the law enables him to maintain his action. But the objection proceeds, in fact, upon mistaken ground. For, as Mr. *Ross* was never answerable in any *other*, than a common law court, it is impossible, that bringing a suit against him, in that court in which alone he was liable to be sued, can ever be considered as changing the *nature* of the security or contract.

On the part of the plaintiffs in error, it was said, the action would not lie, as the consideration was past or executed, at the time of the promise.

2 *Str.* 933.3 *Burr.* 1671.

There is no necessity to go into the nice and hair-breadth distinctions to be found in the law-books upon this point. It is sufficient to refer to the case of *Hayes v. Warren*, and what is said of it in the case of *Pillans v. Van Mierop*. There justice *Wilmot* lays it down as settled, "that where the act is done *at the request* of the person promising, it will be a sufficient foundation to graft the promise upon," though the consideration be past. And as the *request*, in the case before the court, was the sole motive and foundation for the delivery of the silver, there can be no pretence for saying, the plaintiffs in error are not bound, though the consideration might have been *executed*, at the time of entering into the stipulation.

I think the judgment of the lower court should be affirmed.

SMITH, J.—Under the assignment of general errors, five points are made in behalf of the plaintiff in error, viz.

1. It does not appear by the declaration, that the subject matter of the Admiralty suit was of Admiralty jurisdiction.

2. That the writing purporting to be a stipulation, was not a stipulation, nor such a writing, contract, or obligation, as the court of Admiralty had authority to take, and was therefore void.

3. If it was good as a contract, to bind the parties named in it, no action of *debt* would lie on it,

4. It is not sufficiently stated, that the silver coin stated in the declaration was the property of *Lewis Lamoignon*. 1793.

5. If the subject matter of the Admiralty suit was within the Admiralty jurisdiction, it belonged exclusively to the Admiralty to determine on the writing.

I shall consider the first two points together, because they have such a necessary connexion, that most of the reasons which apply to the first will affect the second point or objection.

The Admiralty court has jurisdiction and power to try all maritime cases. Of every thing done on the water below the low-water mark, the Admiralty court has the sole and absolute jurisdiction. Having therefore the natural jurisdiction of things belonging to the sea; but being restrained by statute (15 R. 2d as to wreck of the sea) the party must come for a prohibition before sentence: for after pleading, and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition. 3 Bla. 68, 106. 5 Co. 107. 4 Bac. 249. Carth. 12. Burr. 2037.

Indeed if the want of jurisdiction appears on the face of the proceedings, a prohibition may be awarded after, as well as before sentence. 4 Bac. 249.

But the party who applies for a prohibition after sentence, must shew a nullity of jurisdiction on the face of the proceedings. Does the want of jurisdiction appear on the face of the Admiralty proceedings in this case? If a prohibition would not lie, can the plaintiffs in error have the judgment reversed, at this stage? It is very true, that nothing shall be presumed within the jurisdiction of an inferior court; but what is expressly averred or alledged to be so. But is the court of Admiralty an inferior court? Blackstone mentions it, as one of the four sorts of courts which are of public or general jurisdiction throughout the realm, and not one of the courts of special jurisdiction. It is said to be no court of record, in 3 Blackstone's Commentaries, and in many other books. But as the Marshalsea is a court of record, and yet an inferior court, so it does not follow, nor is it any where laid down, that because the court of Admiralty is said not to be a court of record, it is therefore an inferior court. But it is laid down, that, wherever there is a

1793. jurisdiction erected with power to fine and imprison, that is a court of record; and that a court of Admiralty can fine and imprison for a contempt in face of the court. Though it is said that this court cannot assess a fine, because it proceeds according to the course of the civil law, and is, therefore, no court of record; yet it is observed, that it may amerce a defendant for his default in its discretion, and may issue execution for the same of his goods; and (if he has no goods) may arrest his body, within the body of the county. Therefore the court of Admiralty is in the nature of a court of record of an anomalous kind. And although it is said, that a strict recognisance, being an acknowledgment of a debt on record, cannot be taken in a court not of record; yet it operated as a stipulation by the parties to submit to the order of the court. The caution taken by the court of Admiralty, is called a recognisance or stipulation. And in the act of assembly it is called a recognisance, and it is enacted, that, if forfeited, it shall be recoverable in the Supreme court. The preamble mentions recognisances for the use of the Commonwealth, but the enacting clause says all recognisances; moreover on a forfeited recognisance the Commonwealth is only a trustee for the prosecutor. So here the Commonwealth is a trustee for *Lanoix*. Upon the whole, the Admiralty court, if not strictly speaking a court of record, cannot be said to be an *inferior court*, and it sufficiently appears by the declaration, that the subject matter of the Admiralty suit was of the Admiralty jurisdiction, unless that jurisdiction was excluded, because it is said to be *wreck*, which is exclusively of common law jurisdiction; had there been no additional words in the description of the subject matter, it might have been intended legal wreck, but perhaps not necessarily even then; for it is held, that the word *covenanted* does not necessarily import, that it was a contract by *deed*. But here it sufficiently appears from the declaration, that the subject matter was *not* legal wreck, *of the sea*; because the goods were not cast on shore by the sea. A *ship* cannot be *wreck*, if the ship perishes; yet if any of the servants escape, the law saith, that they shall have the custody of the goods. In the present case, the captain escaped, and saved the silver from the *wreck of the ship*. If the ship be lost on the shore, and the goods come to land (so as it be not legal
- Salk.* 200. *L.*
Ray. 467. *B.*
Bla. 245.
8 Co. 38b. 60b.
1 Ventr. 1.
3 Bla. 109.
12 Co. 104.
13 Co. 53.
H. Bla. 186.
ib. 188.
3 T. Rep. 276.
3 Bla. 108.
L. Ray. 1285.
 —6.
2 St. L. 167.
Burr. 2119.
1 Vez. 453.
Burr. 2037.
2 Inst. 167.
5 Co. 106.
ib. 107.
1 Bla. 203.
2 Inst. 167.

wreck) they shall be delivered to the merchants, paying salvage. From whence it is evident, that the words "saved from the wreck of the ship," are no more to be understood as descriptive of legal wreck—wreck of the sea—goods cast on shore by the sea, than the words, "a record of a court in Jamaica," were descriptive of that sort of record, to which implicit faith is given in *West-Doug. 5. minister Hall.* 1793.

But then it is contended, that the silver, having been brought on shore by the captain and on his suit or libel in the court of Admiralty, process having issued from that court, by which the said silver had been taken into the custody of the marshal of that court, the court had exceeded its jurisdiction, and all its acts were *coram non judice*.

In answer. By the law of nations, one nation is bound to perform those duties and offices of humanity to another nation (and consequently to the individuals composing it) which the safety and advantage of that society require. These duties of humanity are to be performed by the state towards strangers. But if the law of nations antecedent to treaties should be supposed not expressly to inculcate this principle, nor require one nation to perform this duty to another, it is enforced by the 18th article of the treaty of amity and commerce between the *United States and France*.—"If any ship belonging to either of the parties, their people or subjects, shall within the dominions of the other, strike upon the sands, or be wrecked, or suffer any other damage, all friendly assistance and relief shall be given to the persons ship-wrecked, or in danger thereof." To similar stipulations in the 16th article of the treaty with the *United Netherlands*, and the 20th article of the treaty with *Sweden*, these words are added, viz. "and the vessels and effects and merchandizes, or the part of them which shall have been saved, or the proceeds of them, if, being perishable, they shall have been sold, being claimed by the master or owners, or their agents, or attornies, shall be restored, paying only reasonable charges, and that which must be paid in the same case, by the proper subjects of the country."—The article above recited in the treaty with *France* must be construed to be as extensive in this instance, as the

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enumerated articles in the treaties with the *United Netherlands* and *Sweden*. At least a narrower construction would have a very ungracious sound in *European* ears, and would be, in fact, contrary to the law of nations, and to the spirit of that treaty made with us by our first and best friend, by whose friendship our national existence was preserved.

The nation being then bound by the spirit of the treaty, and the law of nations to give this assistance and relief; how can it give them but through its courts, and what court so proper to take cognisance of this maritime transaction, as the court of Admiralty? Was not this court therefore bound, upon the demand of the captain, to take charge and cognisance of the silver so saved? If the Admiralty be the most proper court by which this office and duty of humanity, this article of the treaty can be performed, it necessarily follows, that this court can take stipulations from the parties to perform all legal and necessary orders and decrees, which it may make in the performance of this duty, the exercise of the jurisdiction with which it is for this purpose necessarily invested; and the common law courts have no right to prohibit it from enforcing its sentence. The condition of this stipulation was as legal and equitable, as was that of the bond in the case of *Folkes v. Dominique*. The stipulation can no more be intended to have been by coercion, than that bond. The parties came voluntarily into the court of Admiralty, and, on entering into the stipulation, obtained the silver, and surely they shall not be permitted to deny the effect of that engagement of which they have reaped the fruits.

In answer to the objection, that the Admiralty had no jurisdiction, because the silver was brought on shore by the captain, after being saved from the wreck of the ship. Where the original matter was done at sea, and other matters be done at land depending thereon, yet the trial shall be in the court of Admiralty.

Supposing, but not admitting, that the caution was not good as a stipulation, because the Admiralty had no jurisdiction of the subject matter; is not the transaction good as a contract at common law, and binding on the parties voluntarily entering into the writing for a valuable and sufficient consideration? A contract is defined

L. Ray 1286.

H. Bla. 186.

H. Bla. 194.

Str. 1137.

H. Bla. 186.

1 Atk. 630.

1 Bac. 624.

Ventr. 173.

2 Lev. 25.

Sid. 320.

1 Com Dig.

277 1 Bac.

625.

to be "an agreement upon sufficient consideration to do or not to do a particular thing." In this transaction are all the ingredients requisite to form a contract; parties, consent, an obligation constituted upon a sufficient consideration. The plaintiffs in error came voluntarily into the court of Admiralty, and before the judge of that court, offered to enter into this agreement, and did enter into it, upon a sufficient consideration, viz. having the silver delivered to them, which was delivered accordingly. As to them, it was perfectly immaterial, in what manner the Admiralty obtained possession of this money. They had no right to demand it. If *F. Hopkinson*, Esq. had not been judge of the Admiralty, had this money been in his possession as a private individual, and he had delivered it to the plaintiffs in error at their request, on their entering into this engagement, it would have been intended, that he had entered into it as agent for *Lanoix*, from whom it would have been presumed that he had sufficient authority, rather than that the agreement should be construed void, after the plaintiffs in error had reaped the advantage of it.

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2 Bla. 422.
1 Powell Contr. 6.

1 Powell Contr. 138.
2 Brown, P. C. 249.
vid. Corp. 290.

If his being judge of the Admiralty did not give additional validity to the contract, that circumstance could not make it less binding on the plaintiffs in error, especially as it had been completely executed on the other side. The assent of *Lanoix* must be presumed, the contrary not appearing. Can the plaintiffs in error be permitted to deny the authority of *F. H.* as presumed agent of *Lanoix*, at this stage of the business, (having denied that he had any authority in any other capacity) to enter into the contract.

1 Powell contr. 138.

Even supposing *F. H.* had no authority to make the contract, is it not binding on the plaintiffs in error, they having received the full benefit? Suppose a contract made between a person of full age and an infant, it is voidable at the election of the infant; but as to the person of full age, it absolutely binds: a much stronger case than the present.

Str. 938.
1 Pow. contr. 38, 51.

As to the objection, that, as to *John Ross*, the consideration was executed or past, a full answer is given by justice *Wilmot*, in the case of *Pillans and Rose v. Van Mierop and Hopkins*. The law on this head has been melting down to common sense in late times.

Burr. 1671-2.
Cro. E. 59.
Cro. C. 409.

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3. But it is contended, that, if it was good as a contract to bind the parties named in it; action of *debt* would not lie on it.

F. N. B. 119.

G. 120. K.

121. B. 1 Esp.

182. 3 Bla.

153-4. 2 Bat.

13.

4. Co. 92b.

Rastal's Ent.

301. Cowp.

285.

Doug. 6, 4-5.

A writ of *debt* properly lieth, where a man oweth another a certain sum of money by obligation or by bargain for a thing sold, or by contract, &c.

Before *Slade's* case, debt was the usual remedy for money due on contract. Debt was brought against executors, by a legatee of the third part of the testator's goods, where the *quantum* had been ascertained by the ordinary. Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought, and it is not necessary, that the plaintiff should recover the exact sum demanded. Debt lies on the judgment of a foreign court, although the judgment is not a specialty, and although given by a court proceeding by the rules of the civil law, and not considered as a court of record.

Debt will not lie by drawee against *acceptor*, of a bill of exchange, because it depends upon a particular custom, and is not founded in contract. It binds him by the custom of merchants, but does not raise a duty. But debt lies against the drawer.

1 Wils. 186.

2 Com. Dig.

640.

Hardr. 485.

Salk. 23.

1 Esp. 183.

Cro. E. 355.

461, 494, 544.

Instrument intended as a statute staple, not being executed according to the act of parliament, was void as a statute staple; but debt was held to lie on it as an obligation at common law. Debt lies on a judgment of nonsuit in an inferior court, and plaintiff below cannot say that the inferior court had not jurisdiction, because he had chosen it, and the defendant below had been forced into it. So here, after the money had been lodged in the Admiralty, and would have remained there, if the plaintiffs in error had not applied to that court for it, and voluntarily entered into this stipulation or (if stipulation it is not to be called) contract, as a condition of having it delivered to them.

1 Wils. 318.

2 Com. Dig.

634.

Buller, Nisi

Pri. 167.

Cro. E. 644.

1 Roll. Ab.

593, G. 25.

2 Com. Dig.

638.

Debt lies upon every contract in deed or in law, express or implied. If *A.* gives *B.* money to buy any thing for him, and he doth not buy it. Debt lies by *A.* against *B.* for the money. If *A.* pays the debt of *B.* at his request to be paid upon request, debt lies by *A.* against *B.* So if *A.* delivers money to *B.* to be repaid by such a day, or to be safely kept; or to be paid to another, and

he doth not pay it. If *A.* promises *B.* 20*l.* to marry his daughter, and he marries her, he shall have debt against *A.* 1793.
A. Attorney shall have debt against his client, for money which he hath paid for his client, for costs of suit or to his council, &c. If money be delivered to *A.* to be paid to *B.* *debt lies by B.* If *A.* retains a tylor to make a garment for his own daughter, debt lies against *A.* *F.N.B. 120. K. Ibid, 121. 2 Com. Dig. 638.*
 So on a retainer to embroider a gown for his daughter's servant. So, though the promise be for *the advantage of a stranger*; as if a man promises to pay so much for the education of the children of another. If *A.* promises 10*l.* to a surgeon for curing another, or to a carpenter to make a house for another, he will pay for it, an action of debt or *assumpsit* will lie in such cases. Debt lies for every duty created by common law, or by custom. *Cro. E. 180. Ib. Allen, 6. Cro. J. 521. 2 Com. Dig. 638.*

But it was adjudged, that if *A.* retains an attorney to prosecute the suit of *B.* debt does not lie for the attorney against *A.* *Cro. C. 107, 194.* The reason of that, *Holt* says, was that the attorney had a remedy against the party for whom he acted, notwithstanding he was employed by the defendant; and indeed the authority of that case is here shaken, or rather its application is confined, so that it cannot weigh against the above cited, and many other cases, in which it has been adjudged, that debt will lie against *A.* on his contract in behalf of *B.* for service to be done to *B.* *1 Roll. Abr. 593. C. 45, 51.* Besides, is there a single instance of an information for money due to the king, which is not in debt, though on simple contract? The reason probably is, that against the king the defendant cannot wage his law.

By these cases, and by the following cases and reasons, an answer is given to the objection, that, supposing debt would lie against *Lacaze* and *Mallet*, it would not lie against *John Ross*, who was only their surety, and his undertaking was only collateral. It cannot be said that in this contract his undertaking was collateral. It was simultaneous with that of *Lacaze* and *Mallet*, made at the same instant. It was a joint contract. It was one transaction by them all, before the money was delivered by the Admiralty. *1 Powell Contr. 349—50.*

In the case of *Machen* and *Fortune v. Staynton*, the effect of an agreement is carried further than the letter of it, even against a surety; which is contrary to the opinion of *Buller* in *Stratton v. Rastall*. *1 Brown's P. C. 87. 2 T. Rep. 370.*

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 F. N. B.
 122. K.

2 T. Rep. 366.

3 T. Rep. 62.

1 Salk. 25.
 1 Salk. 139.
 12 Mod. 86.
 5 Mod. 133.

It is laid down, that *A.* shall have *debt* against *B.* who becometh pledge for another, upon his promise to pay the money, without any writing made thereof.

Under this head it is contended, that no action would lie against *John Ross* the surety, who never in fact received any of the money; and the case of *Stratton v. Rastall* is cited in support of this position. But (admitting that case to be law) it is clearly distinguishable from the present. There the plaintiff, by his own act, lost the benefit of the express contract. By his neglect, it was relinquished, and became extinguished; and the surety, not having received any part of the money, was not liable upon the implied contract, which could be supported only upon equitable principles. There the defendant was only surety for the payment of the annuity; not for the repayment of the consideration money, for which the action was brought; but in the present instance, the express contract of the defendants was, that the money should be delivered to *Lanoix* or the right owner. No act was done by the other party to relinquish or nullify this express contract, for the nonperformance of which the present action was brought. On this point let me repeat the words of *Ashurst*, "I have so great a veneration for the law, as to suppose, that nothing can be law, which is not founded in common sense, or common honesty."

4. It is alledged, that it is not sufficiently stated in the declaration, that the silver was the property of *Louis Lanoix*. That the trust of *Lacaze* and *Mallet* was for remitting the money to *Lanoix*, or the right owner, and the declaration does not state, that they did not deliver it to the right owner, which it ought to have done.— Thus, it is said, every word of the declaration may be true, and yet the trust performed.

Answer. This suit is in the name of the Commonwealth as trustee for *L. Lanoix* or the right owner. It was not necessary to state more particularly, that the silver was the property of *L. Lanoix*. If it had not been his property, and the defendants had delivered it to the right owner, they ought to have pleaded that.— In an action on a promissory note payable to *A.* or order, or on a bond payable to *A.* or assigns, brought by the payee, does he ever aver that the defendant did not

pay the same to his order or assigns? If assigned, that must come on the other side. 1793.

Were such averment necessary, the want of it is cured by the verdict. Many inaccuracies and omissions which would be fatal, if early observed, are cured by a subsequent verdict. For if a declaration or plea omits to state some particular circumstance, without proving of which at the trial, it is impossible to support the action or defence, this omission shall be cured by verdict. In other words, the general rule is, that where a thing is so essentially necessary to be proved, that if it had not been given in evidence, the jury could not have given such a verdict, there, though it is not stated in the declaration, yet this defect shall be aided by the verdict. The authorities which support this principle, also substantially answer the first objection.

*L. Ray 1061.
Str. 931.*

3 Bla. 394.

*L. Ray 109.
12 Mod. 510.
Carth. 389.
Hard. 117.
Buller 2020.
Buller 167.
Cowp. 825.
Doug. 638.*

5. It is contended, that, if the subject matter of the Admiralty suit was within the Admiralty jurisdiction, it belonged to the Admiralty exclusively to determine on the writing,

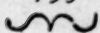
I shall consider this objection, 1. Supposing the writing to be a stipulation which the Admiralty had authority to take; and, 2. Supposing it to be no stipulation because the Admiralty had no authority to take one, I will consider it as a contract at common law.

In *Brymer v. Atkins*, lord *Loughborough* says, that, "Operating as a stipulation, execution of it belongs to that jurisdiction to which the parties have agreed to submit."

H. Bla. 129.

That all proceedings legally commenced in any court to which *the parties have agreed to submit*, may be more properly carried into execution by that court than by any other, and that no superior court ought to prohibit the inferior court from carrying such proceedings into execution, unless when authority is expressly given to the superior court for this purpose, seems not to admit of dispute, when the party intitled to the effect of those proceedings applies to the inferior court to have them carried into execution; but does it follow, that, if the party intitled to such effect chooses to apply to a superior court of common law and general jurisdiction, the superior court is precluded from carrying into effect any of the acts of the inferior court? Does this follow especially

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where the party applying had been forced into the inferior court? If the party who had chosen the Admiralty jurisdiction, in which to institute a suit, should be confined to that court to the conclusion of the transaction, does it follow, that the other party, who had been forced into it, should be thereby deprived of his election of applying to the courts of common law, and of trial by jury, to carry into effect a stipulation taken in the cause, by the Admiralty, and so deprived without the intervention of positive law, or any solemnly adjudged case? I think the affirmative cannot be supported. It is even admitted, that debt lies in the court of Common Pleas on judgment on *scire facias* on a recognisance in the court of King's Bench.

2 Com. Dig.
634. Dy.
206a. in
marg.

Bail bonds must be sued in the same court in which the bail was given, because the statute directing the assignment of them gives the court, after such bonds are put in suit, an equitable jurisdiction to stay proceedings, and to let the defendant in to try the merits of the original action upon reasonable terms; which jurisdiction cannot be exercised unless the proceedings on the bail bond, and the original action were in the same court. But even in this case, upon special circumstances, as if the defendant lives out of the jurisdiction, the bail bond may be sued in another court.

Barnes 92.
Bla. 877.
Burr. 1023.
642. 3 Wils.
348.

Burr. 642.

Debt lies in the King's Bench upon a recognisance taken in Chancery, although the plaintiff had before sued a *scire facias* in Chancery on it, obtained judgment there, and sued an *elegit*.

Cro. E. 608,
817.

Debt lies in the court of Common Pleas, on a judgment in the Mayor's court at *Guildhall*, on a recognisance taken before the mayor, &c. And lord *Anderson* said, admit the recognisance was not well taken, yet because that, on the *scire facias* upon it, the defendant did not take advantage of it, he shall be bound by his said admission.

1 Leon. 284.
2 Com. Dig.
635. Dy. 219.

Debt lies in the King's Bench on a judgment of non-suit in an inferior court, and it is not necessary that the now plaintiff should aver, that the inferior court, into which he had been forced, had jurisdiction of the subject matter of the original action.

1 Wils. 316.
Cro. E. 56.

Debt lies in the Marshalsea, or any other court (of record as stated by *Comyns*) on a judgment in the court of Common Pleas or King's Bench.

1 Salk. 209.
2 Com. Dig.
634.

Debt lies in the court of King's Bench on a recogni-
 sance (of bail it was here) taken in the court of Common
 Pleas. And on judgment on *scire facias* on recogni-
 sance in the King's Bench, debt lies in the court of Com-
 mon Pleas.

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6 Mod. 132.
 7 Ven. 349.
 2 Com. Dig. 34
 Dy. 300, in

Debt upon a judgment for debt or damages in a court
 of London, by special custom lies in the court of King's
 Bench or Common Pleas, though the original action
 could not have been brought there.

margin.
 2 Com. Dig.
 634, 1 Rol. abr.
 600, l. 45.

Bond taken by the Admiralty to perform their orders, it
 should be sued at common law. It is true, the book
 in which this is stated, is not of much authority; but is
 there any adjudged case contrary, or is this case contra-
 dicted by any judge? It is said *arguendo*, that a strict
 law recognisance, upon which a *scire facias*, or action
 of debt, or an *extent* might be brought, could not be ta-
 ken by a court not of record. But the court only says,
 "that execution of it belongs to that court, and that
 jurisdiction, to which the parties have agreed to submit."
 Besides this was in the case of *prize*, in which the Ad-
 miralty has the sole and exclusive jurisdiction.

1 Keb. 88.

H. Bla. 174.

ib. 189.

3 T. Rep. 270.

In answer to the many instances of actions being
 brought in different courts on judgments of other courts,
 it is said, that is because all such suits may be removed
 thither before judgment. This answer is not sufficient.
 An action cannot be removed from the court of King's
 Bench to the court of Common Pleas, nor from a foreign
 court to either, nor from either to the Marshalsea.

It is also said, that if the Admiralty had authority to
 take such a stipulation, it had also authority to enforce
 it; that there is no instance of any such action having
 ever been brought in the courts of common law, which
 is an argument that none will lie.

That every court has authority to enforce its own
 decrees and acts, is a position supported by reason, law,
 and practice; but it does not follow that it has the ex-
 clusive authority. The contrary is evident from the cases
 cited on this head. Indeed as this stipulation was to
 indemnify the judge and officers of the Admiralty, it
 would have been judging in his own cause, had he en-
 forced it in that court.

To say nothing of the prohibitory act of assembly, it
 is not too strong an expression to say, that even an act

1 St. L. 33.
 Hob. 87.
 Holt 396.

1793. of the legislature giving this power to a judge, would be void.

Salk 397, 607 Besides, the Commonwealth may sue in what court
Str. 1173. it pleases. The king may bring a *quare impedit* in the
Hardr. 503. King's Bench.
F.N.B. 7B.

32 E. 4 *Inst.* 17 No authority was cited in support of the position, that
Plowd. 244a. because no such action has ever been brought, therefore
4. *Bas. abr.* none will lie. *Lit. sect.* 108, *Co. Lit.* 81, and *Black.* 309,
203. are usually cited in support of this argument.

Lord C. J. *Holt*, was sufficiently attached to form, and leaned enough to formal objections ; so far at least, as appeared necessary to establish certainty and precision in practice ; yet we find, that when it became his duty to apply general principles to new occasions, his great, comprehensive, acute, pervading and intuitive mind, was not fettered by form, especially when an adherence to it tended to entangle justice in a net of law, and a departure from it did not weaken any of those fundamental principles, upon which the security of property depends, and which ought therefore to be holden sacred. He says

Comp. 276.

L. Ray., 957, " it is an argument, when founded on reason, but none
6 *Mod.* 56. when it is against reason." He considers *Littleton's*

opinion, and says, " it has no great force. If it had, it would have been destructive of the many new actions, which are at this day held to be good law." And he cites many instances of new actions grounded on the common reason, and the antient justice of the law. And

2 *Wils.* 146. lord *Camden* says, " I wish never to hear this objection
See *Hargr.* again." And *Littleton* himself adds, "*sed quære de hoc.*"
Co. Lit. 81b. *Holt* further says, " We must not be frightened when a mat-

ter of property comes before us, by saying, it belongs to (another jurisdiction) the parliament, we must exert the queen's (the Commonwealth's) jurisdiction."

L. Ray. 957. If, therefore, we consider, that the law does not consist
6 *Mod.* 56. in particular instances or precedents, but on the reason
L. Ray., 957. of the law, we should not be warranted by the reason of the law, any more than we are by adjudged cases, in holding, that no action would lie, in the present instance, at common law ; or that an action of *debt* would not lie at the suit of the Commonwealth, supposing the writing to be a stipulation.

If it should not be considered as a stipulation, but a contract at common law, I think, there cannot be a doubt,

for the reasons given under the third head, but that an action of debt is maintainable in a court of common law. We cannot reverse the judgment, unless we are clear, that such action would *not* lie.

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Had I any doubts as to the form of this action, I would say with lord *Mansfield*, that judges ought to lean against objections, which have no relation to the real merits, much more when the plaintiff is clearly entitled to recover on the merits, and must recover in another action.

Burr. 1243.

H. Bla. 241.

Burr. 2588.

I am, for these reasons, of opinion, that judgment be affirmed.

ADDISON, J. Though the state of Pennsylvania, by its officers of the Admiralty, had possession of this coin, yet, having prescribed forms and limits to the exercise of its sovereignty, its officers can execute only those portions of power, and in that manner, which the law prescribes to them. The court of Admiralty, therefore, though the agents of the state, may be supposed to have taken, exercised, and surrendered the possession of this coin, by authority, without authority, or against authority; and may therefore be considered as acting judicially within their jurisdiction, or as innocent possessors, or as trespassers. Even trespassers may take a promise, from a third person, to restore to its true owner, the property, which is the subject of the trespass; and this promise may bind the person who makes it; for the restitution is a lawful act. Innocent purchasers may surely do so, and such promise, to them, will be free from all objection. But such promise made judicially, to a sovereign state, through its officers, acting judicially upon a subject within their jurisdiction, and made the condition of their parting with a possession, which they acquired, held, and surrendered, judicially, by authority, and due form of law, must be considered as binding with peculiar force.

As the principles of our government hardly warrant a disposition to indulge the prerogative of administering justice, in one form, to the sovereign, and in another, to the citizen; but seem to require the application of one rule to all; so neither, without some reason of policy or justice, should a promise made to a state, acting in its judicial capacity without authority, be held less binding, than if made to a citizen acting as a trespasser.

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In my examination of the errors assigned on this record, and the arguments thereon, I have been led to arrange them in four points of view.

1. Is a stipulation taken regularly and judicially, by the court of Admiralty, acting on a subject within its jurisdiction, a sufficient ground of an action of debt, in a court of common law?

2. Is the stipulation stated on this record to be considered here, as taken regularly and judicially, by the court of Admiralty, acting on a subject within its jurisdiction?

3. Is this stipulation independent of all judicial circumstances, such a contract, as will maintain an action of debt, against *Lacaze, Mallet and Rofs*?

4. Is a breach of this stipulation sufficiently set forth in the declaration?

These questions seem to involve all the disputed points in this case.

1. Is a stipulation, taken regularly and judicially, by the court of Admiralty, acting on a subject within its jurisdiction, a sufficient ground of an action of debt in a court of common law?

Vinn. Just.
Inst. 553-4.

A stipulation, in the Roman law, is a promise, conceived in a set form of words, which binding without any writing or consideration, was frequently annexed to contracts, which without it, would not be binding, to render them so; or to contracts of themselves binding, to render them yet more solemn.* Stipulations were either voluntary, when entered into from the mere consent of the parties, or necessary, when interposed by judicial authority, either in the course of a suit, to secure its effect, or without suit, to accomplish a summary remedy. When any thing was stipulated to be done, or not done, it was usual to annex a penalty, which, in case of a breach of the stipulation, might be the measure of the damages, and prevent any dispute, trial, or ascertainment. And, in all kinds of obligations, there might be *fidejussors* or sureties, whose obligation might also precede or follow that of the principal; but,

ib. 571-4.

ib. 564-5.

ib. 594-9.

* In the Roman law, the stipulator was the person requiring the promise: with us, the person promising is usually called the stipulator. *Wood's Inst. Civ. Law*, 220-4.

by a regulation introduced by *Justinian*, they were not to be called on till after the principal, if he was solvent and to be found: yet this seems not to have extended to stipulations by judicial authority, nor perhaps to mercantile transactions; and, in all transactions, to which it did extend, it became usual to insist, that the *fidejussor* should expressly renounce this benefit.

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Stipulations, so frequent in the civil law, were naturally adopted by a court, whose principles and proceedings were, in a great measure, regulated by that law. Analogous to recognisance of bail, at common law, stipulations were used, by the court of Admiralty, to enforce compliance with its process and decrees. When the Admiralty went farther than mere analogy, and allowing its stipulations the force of a recognisance in a court of record, endeavoured to proceed on them as such, the courts of common law prohibited them, and would not suffer this court of special jurisdiction, to assume to itself the authority of a court of record, and bind the estates of the subjects of the realm. At last however, from the necessity of allowing the Admiralty to support its jurisdiction, and enforce its authority, the courts of common law, though they held, that a strict recognisance, an acknowledgement of a debt on record cannot be taken in the Admiralty, a court not of record; yet a stipulation, though in the form of a recognisance, having none of its attributes, nor to be proceeded on as such, nor like it, in its consequences, might be taken there, and that, as the courts of common law will, in a summary manner, enforce compliance with any rule incidentally made in the course of their proceedings (a rule to stay waste, for instance, in the proceeding in ejectment) so a court of Admiralty, acting judicially, on a subject within its jurisdiction, may, as a proper and convenient mean of executing its authority, adopt and enforce a stipulation, which being an undertaking of the party, to submit himself to the authority of the court, execution on it belongs to that court, and that jurisdiction, to which he has expressly agreed to submit.

3 Comm. 108,
109, 291.

H. Bla. 188.

Ld. Ray. 224.
235, 1285. H.
Bla. 185, 189.
3 T. Rep. 329.
343. Stat. 13.
R. 2, c. 5. 15.
R. 2, c. 3.

The motions for prohibitions, to the proceedings of the court of Admiralty, on stipulations, seem to have been made, on the ground, that they were proceeding on a contract made at land, and the prohibitions, when

Cases last cited
1 Bas. abr. 627
Cartb. 26.
Hardr. 473,
denied 2 Str.
890.

1793. granted, seem to have been granted on that ground, as well as on their usurping the appearance and effect of a recognisance of record. But, notwithstanding the prohibitions, I have not been able to discover any suit at common law on a stipulation. *Pollexfen*, arguing, in the court of King's Bench, against a prohibition, says, "It is not new, that things arising on land may be sued for in the Admiralty, for so it is in all cases of stipulations." *Dr. Lane*, an eminent civilian, arguing, in the same court, against a motion for a prohibition to the proceedings of the Admiralty on a stipulation, by part owners, for the safe return of a ship,* states, that, "if such prohibition were granted, the court of Admiralty would signify nothing, because most of their proceedings are, by taking such stipulations, and there could be no remedy on them at common law." This reasoning seems to have prevailed. The counsel arguing, in the court of Common Pleas, for the demurrer to a declaration in prohibition to proceedings in the Admiralty on a stipulation, seem to state it as established by the cases cited on the other side, that land cannot be affected, nor an action of debt be brought on a stipulation, like the one now in question, with a penalty to the king. In the same case, lord *Loughborough* says, that such a stipulation has none of the attributes of a recognisance, cannot be proceeded on as such, and is not like it, in its consequences. In argument, in the King's Bench, against a prohibition, the counsel state, that in an action of law, by the owners of a ship taken as prize, against the captors (the court of Admiralty having decreed, that the ship was not a prize) lord *Mansfield* nonsuited the plaintiff; because the question arose out of a prize cause, and courts of Admiralty ought to enforce their own decrees. In the court of Common Pleas of *Philadelphia*, in a case of the same kind, president *Shippen* uses almost the same expressions, in giving the opinion of the court, that the action could not be sustained; because, to sustain it, would be to carry the decree of the court of Admiralty
- 3 *Mod.* 245.
2 *Ld. Ray.* 1285.
H. Bla. 185.
3 *T. Rep.* 333.

* This was the point before the court in *Carib.* 26, and *Hardr.* 473. and though the Admiralty jurisdiction was there denied, it seems to have been allowed here, and more pointedly in 2 *Str.* 890: so it finally prevailed.

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into execution, which (the Admiralty being the proper judicature to carry into effect its own decrees,) he declares, the court of Common Pleas had no authority to do. The principles of this decision are fully explained in the case of *Le Caux v Eden*. Such suit could not be supported because it arose out of the question, "prize or not prize," which, with all its consequences, depending on the rights of war, part of the law of nations, belongs entirely and exclusively to the courts of Admiralty; and as the courts of common law cannot, at all, enquire into it, they can receive no evidence of it, not even the evidence of the decree of the competent court. In this case of *Le Caux v. Eden*, the counsel for the plaintiff contended, with great earnestness and warmth, for the benefit of a common law redress. But no suit of this kind having ever been brought was a strong argument, that none could be supported, and as the Admiralty had full authority to remedy an unlawful capture, and all its consequences, the court thought, it would be extremely inconvenient to withdraw this question or any of its incidents, from a jurisdiction proceeding on a general law of all nations, and in a summary and equitable manner, and bring it before a jurisdiction governed by a limited municipal law; and proceeding with a formality and mode of proof ill suited to the nature of the subject. If captors were liable to a suit at common law, by every person affected by the capture, none would venture to take a prize. And if foreigners had no remedy, for injuries done to their property, under colour of prize, but from suits in our courts of municipal law, to the principles and effects of which they are strangers, mutual confidence between nations would be destroyed, and, in a war between any two nations, all others would protect themselves by force, and compel by arms that administration of justice, to which they are reciprocally entitled.

Doug. 572.
597.

This collection of opinions and decisions, respecting the court of Admiralty, shews the extreme caution, with which courts of common law interfere with the jurisdiction of that court; and shews, that its jurisdiction, in cases of stipulation, though, at first interrupted and denied, was, at last acknowledged. The conclusion to

Hardr. 473.
2 L. Ray,
1285.
2 Str. 890.

H

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be drawn from this is, that every argument, which supports its jurisdiction, bears against the jurisdiction of the courts of common law.

But it may be said, that the doctrine, respecting the prize court of Admiralty, is not conclusive, when applied to the Instance court, with which the courts of common law have, in many cases, a concurrent jurisdiction. It will, however, be observed, that, of the authorities cited, many are in the Instance court, and that there, the reasons of inconvenience, in all, have great influence. The sea, if I may so express it, is the *territory* of all nations; and as transactions are to be governed by the *lex loci*, things happening on it are to be governed by the law of nations, rather than any municipal law. Therefore courts of Admiralty are instituted in all states, and governed by the same code of laws.— But why institute them, if every incidental occurrence may be drawn into a court of municipal law? Foreigners may frequently be affected by things happening on the sea, the highway of the world, and have like reasons to demand the maritime mode of investigation in other cases, as in the case of prize. Their situation may not admit delay. The mode of proof and trial, by the municipal law, framed for internal transactions, may, with respect to maritime affairs, be impracticable or inconvenient, and will generally be unknown. And it may seem hard, after commencing, supporting, and concluding a suit in the Admiralty, to be drawn into a court of municipal law, for the attainment of its object, or an enquiry whether it has been attained or not. If the court of Admiralty have jurisdiction over the principal matter, it will also have jurisdiction over the incidental, and may enforce compliance with the stipulation. If it had no jurisdiction over the principal matter, any incidental judicial act is void. In any case, the application to a court of common law seems to be, at least, unnecessary, and may be oppressive. It appears to be new, and, if its tendency be improper, it ought not to be countenanced.

But here it is urged, that application to a court of common law was necessary to obtain the advantage of this stipulation; for one of its conditions is to indemnify the judge and officers of the Admiralty, and

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unless the courts of common law will enforce this, he must judge in his own cause, which is impossible. Now, although the breach of this condition is not averred, and this cannot be a suit on it, yet the judge of Admiralty had an interest in this suit, if the delivery of the money to *Lacaze* and *Mallet* was not a judicial act: for, if it was not, he was answerable for it; and if he could oblige them to pay it over to *Lanoix*, he would save himself.

It may also be said, that to remit the party for remedy on this stipulation, to the court in which it was taken, may be to deny all remedy; for that court no longer exists, and its authority is vested in the courts of the *United States*.

Here then, it is alledged, is a reasonable, if not a necessary, ground for a suit at common law on this stipulation. And where there is a reasonable and necessary ground for a suit at common law, why should not an action of debt lie on a stipulation, as well as on a judgment in a foreign court? There is no adjudged case to the contrary; and the boundaries of actions are every day enlarging. Such an action of debt, it is true, will not lie on it, as on a recognisance or judgment in a court of record. It is not of such solemnity, as to be answered by the plea of *nul tiel record*; nor is it perhaps of such absolute verity, as to be conclusive at the time, and not to be denied or examined. Yet it may be said, that, though it be not an acknowledgment of a debt on record, it is an acknowledgment of a debt, which, if for an honest and good consideration, may be recovered at law. A recognisance of bail, in any action in any court, though an incidental transaction, may yet be the ground of another action in another court. And by an act of assembly, passed since this stipulation was taken, forfeited recognisances in the Admiralty, or Admiralty sessions, shall be sued for in the Supreme court. 2 St. L. 167.

But, supposing this reasoning to lead to a conclusion, that a stipulation regularly and judicially taken by the court of Admiralty, acting on a subject within its jurisdiction, may be a good ground of an action of debt at common law; we must, before we decide the case before us, discuss the second question.

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2. Is the stipulation stated on this record to be considered here as taken regularly and judicially, by the court of Admiralty, acting on a subject within its jurisdiction.

It is said, that it is not; for the subject was wreck, of which the Admiralty had not jurisdiction.

Wreck, or *wreck of the sea* in the strict technical sense of wrecked goods, which the sea casts upon land, is excluded from Admiralty jurisdiction. But there is another more lax sense, in which it is used, for *ship wreck*,

1 Powell contr. or wrecked goods in general: and, in this sense, it includes *jetsam*, *flotsam*, and *ligan*, which are subjects of Admiralty jurisdiction. The word *covenant*, though commonly, does not necessarily, import a contract by deed. *244. 4 Burr.*
2035—9.
1 Burr. 271 3
5 T. Rep. 720
—1.

The word *legacy* has been held to extend to land. So the word *wreck*, though properly meaning wrecked goods cast on land, has been used judicially and by lawyers, for wrecked goods at sea. In the judge's report of a trial in trover, for part of the cargo of a ship foundered, and *never heard of*, the ship and goods are mentioned as a wreck. Lord Hale, in a treatise *De Jure Maris*, says, "of wreck of the sea there are two kinds: 1, such as is called properly so, goods cast upon the land on shore; 2, improper, for goods that are a kind of sea waifs, or stray, flotsam, jetsam, and lagon." *5 Burr. 2732.*
C vii. Hargr.
Law Tracts
37.

If on such occasions, and by such persons, the word *wreck* has been used in this general sense, shall we wonder, if Lacaze and Mallet, in their petition to have this money delivered to them, should use it in the same sense, and that it should have crept, by way of parenthesis, into the order for the delivery of the money to them? It is not shewn to us in the libel of the master, on which the court took jurisdiction, nor in any other part of this record. And, even where it is used, it is evident, that it is not used in the proper, but in the improper sense. It is wreck of the *ship*, and not wreck of the *sea*. I cannot therefore bring myself to say, that this record expressly excludes the jurisdiction of the Admiralty; for it does not so manifestly appear. Is it then necessary, that it expressly and sufficiently state this jurisdiction?

It is said, that this is necessary; for the court of Admiralty is not a court of record. And it is said, that this is not necessary; for the court of Admiralty is not an inferior court, and, in superior courts, the jurisdiction is presumed.

Many inferior courts are courts of record ; and though the court of Admiralty be not a court of record, it may not, therefore, be an inferior court. 1793.

The equity court of Chancery is not a court of record ; and surely, it is not an inferior court. In this respect, the court of Admiralty is not an inferior court, that its sentence, on subjects within its jurisdiction, is not examinable in the superior courts of common law. But, in every respect, it is not such a superior court, as, like the courts of *Westminster Hall*, its jurisdiction is general and presumed, without averment. As to subject and place it is limited : and every libel in the Admiralty must lay the cause of suit to be within the maritime jurisdiction, and so as it may appear to the courts of common law to be so indeed ; “ for a man is not to sue in the Admiralty because it is a ship.”

But it is contended, that the jurisdiction of the Admiralty does appear ; for this is a case of salvage. Together with the ship, the wages of the mariners were lost, and they contributed to the recovery and safety of the goods, as any other individuals, and upon the same terms. It is contended also, that it is the law of *France*, and for the mutual convenience of all nations, that, in all such cases, the property saved shall be deposited in the Admiralty, subject to its jurisdiction ; and that, the parties being citizens of *France*, it was expected on both sides, that this should be done, and that a decent respect for the laws of *France*, and regard for general convenience ought to sanction this jurisdiction. I feel no inclination to oppose this reasoning ; and I think this was a proper exercise of Admiralty jurisdiction, warranted by the custom of *France* and other nations, advantageous to the parties concerned, and necessary in all maritime countries, for the protection of foreign property : and I think, therefore, that this jurisdiction ought not to be disputed with the Admiralty, and that it ought to be considered as acting judicially in the exercise of it.

If, together with jurisdiction, there must also be an averment of jurisdiction, I cannot think this sufficiently implied in the recital of the order of the Admiralty to deliver the coin to *Lacaze* and *Mallet*, on their giving caution, “ agreeably to the practice and usage of that

1793. court, and the laws of this state ;" these words referring to the manner of the caution, not the matter of the suit. And, in some cases, averments, though false and not traversable, as that a plaintiff in the Exchequer is a king's farmer, must be made. So, to found an action at law, on a judicial proceeding in the Admiralty, an averment may be necessary, in the declaration as in the libel, that the subject was within the jurisdiction of the Admiralty. For, though it be a rule, that, if a party, having an opportunity to object to the jurisdiction of the Admiralty, lies by till after sentence against him ; the court of common law will not, in order to prohibit the Admiralty, look out of the proceedings, to find irregularity, and will presume jurisdiction unless want of it appear on the proceedings ; yet this is in the case of motions for prohibition, where the other party has gone on in the Admiralty under an *apparent jurisdiction*, as on a contract laid in the libel to have been made *at sea* ; and then the court of common law may refuse to interfere, in opposition to a jurisdiction, to which the party has submitted. But if this question come before a court of common law, not on a motion for prohibition, but on a suit instituted on some of the Admiralty proceedings, will the same reasons which induce a court of common law not to stop the proceedings of the Admiralty, induce it to enforce them ? Because it permits, must it authorize them ? Courts, not favouring negligence, will perhaps overlook an objection, which appears not on their record, when they would not overlook it in their record, when they were required to act on it, and make it a ground of their proceeding : for not to correct an irregularity, differs from supporting it. In an action of debt on a judgment of nonsuit, in an inferior court, it would seem to be necessary, to aver, in the declaration, that the nonsuit was given at a court held within its jurisdiction ; and this is sufficient, though the proceedings of the plaintiff below have been illegal from beginning to end. But it might have been doubted perhaps, whether this averment would have been sufficient, if the plaintiff below proceeding illegally had obtained judgment, and brought an action of debt on it. Much may, in such case depend on the question, who urges the objection ? Did he occasion, or could he have resisted the irregu-

9 Co. Rep. 472.
6 Co. Rep. 380.
System of
Pleading 184.

12 Co. 77, 78.
4 Burr. 2035
-9. 2 T. Rep.
475, 649, &c.

4 Burr. 2035.

3 T. Rep. 318.

Murray v.
Wilson.
1 Wils. 316.

larity in the inferior court, or was he affected by it there?

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In an action against an officer of an inferior court, for an escape, the court of King's Bench held, that, supposing the plaint below to be erroneous, the officer could justify the arrest, and shall not, in this collateral action say, that the plaintiff could not have had the effect of his suit below; nor shall he, after verdict, when every thing necessary is presumed proved at the trial, object, that the declaration alleges not, in what manner the defendant below was indebted, nor shews, that it was a debt of which the inferior court had jurisdiction.

Bull v. Steward, 1 Wils. 355. 2 Wils. 5.

In what situation then were *Lacaze* and *Mallet*, in the court of Admiralty. They were neither plaintiffs nor defendants, they were neither the persons libelling, nor the persons libelled against. They were not the owners of the money, nor could they have been considered as the agents of the owner authorised to receive it. For if they had either been the owners or authorised agents, such a stipulation would not have been necessary. It was not necessary from an owner, for he has a right to his money, without giving caution. It was not necessary from an authorised agent; for caution was a matter that lay only between the agents and the owner, and no other than the owner had a right to require caution, which he did not choose to require, and thus bring sureties into danger.

But whatever they were, it will be said, shall they, trusted at their own request, dispute the authority under which they acted, when they are called to an account for misconduct, and the person injured joins in the demand? And after the proceedings in the Admiralty, and defence and verdict at common law, shall enquiry be made, as to the Admiralty jurisdiction? Who shall dispute the jurisdiction of the Admiralty over this money? The owner. Were *Lacaze* and *Mallet* the agents of the owner? They might then, instead of allowing the jurisdiction, in his name, have applied for a prohibition. They cannot, after stating themselves to be, now deny that they were, the agents of the owner? If they admitted the jurisdiction to give this money, and take this stipulation, to permit them to deny it, when they are called to account, and the person injured applies to

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the stipulation for a remedy, would, it may be said, shock the plainest principles of honesty, and break the bands of mutual confidence.

There is weight in this reasoning, and surely the absurdity would be shocking, if no remedy existed on this stipulation. But the present question is, not whether any remedy exists on the stipulation, but whether the stipulation is now to be considered as regularly and judicially taken, on a subject within the jurisdiction of the court of Admiralty. If there were in the information an averment of jurisdiction, it might be improper, at this stage of the business, to suffer it to be denied. Even though there be no averment, it may be contended, that this would be improper, unless want of jurisdiction appear on the face of the proceedings. If this appear, it is never too late to object to it. My doubt is, that a want of jurisdiction does so appear.

I have already acquiesced in the jurisdiction of the Admiralty, in taking this money into its possession, for safe custody, and for examination and decision of all claims to it. So far I admit the acts of this court were judicial. But I doubt whether the duty of the court extended beyond the preservation of the money, and the delivery of it to the owner or his agent. I think it extended not to the transmission of it to the owner's place of abode, or into the owner's hands, unless he came to that court, or its officer, to receive it. This stipulation was taken, that *Lacaze* and *Mallet* should remit the money to *Lanoix*, and indemnify the judge and officers against his, and every other claim. It was the duty of *Lanoix* to come to the judge of Admiralty, for the money; it was not the duty of the judge of Admiralty to remit it to him. If *Lacaze* and *Mallet* were the authorised agents of the owner of the money, it was not the duty of the judge to take security for the performance of their agency. If they were neither agents nor owners, it was not the duty of the judge to deliver the money to them. Can a judge be considered as acting judicially, when he is doing what it is not his duty to do? Can a judge need an indemnification for doing a judicial act? Or can the stipulation taken in an act not judicial be a judicial act? I doubt whether this be a judicial act. But it is a reasonable and fair way of

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serving the owner, by the earliest and easiest method of transmitting his money to him. And the only light in which I can consider *Lacaze* and *Mallet*, in this transaction, is as the voluntary agents of the judge of the Admiralty, intrusted by him, at their request with the custody and transmission of this money. For the performance of this trust, and for indemnifying himself, he takes this stipulation. Is he not then acting at his own risk, as a man, not regularly as a judge? And would not a better way have been, to have taken a bond?

There being yet grounds of doubt, I proceed to the third question.

3. Is this stipulation, independent of all judicial circumstances, such a contract, as will maintain an action of debt against *Lacaze*, *Mallet*, and *Rosi*?

In considering whether this stipulation, stripped of all judicial solemnity, and taken only as a contract *en pais*, be sufficient to maintain an action of debt against *Lacaze*, *Mallet*, and *Rosi*, I lay aside all consideration of the manner, in which the court of Admiralty got possession of the money. Holding it a matter of indifference, whether the judge and officer of that court acted by authority, or as trespassers. I consider it as undisputed, that they might make such a contract, and I proceed to examine its legal operation on the plaintiffs in error.

Pennsylvania, whether by right or wrong, it is immaterial, being in possession of this coin, gave it up to *Lacaze* and *Mallet*, to deliver to *Lanoix*; and *Lacaze*, *Mallet*, and *Rosi*, bound themselves to *Pennsylvania*, in the penalty of 4000*l.* sterling, that *Lacaze* and *Mallet* would deliver it to *Lanoix*. If *Lacaze* and *Mallet* had been the agents of *Lanoix*, *Rosi* might have had the advantage of this, at the trial; and, after this verdict, I will take it, that they were not, and that this was not an engagement, that a man entered into, as a necessary mean of obtaining his own money; but an engagement entered into, whereby he obtained the money of another man, for the purpose of delivering it to him. It was a bailment, a fair contract, and the bailee, though acting *gratis*, is liable, on the implied undertaking, for gross negligence, and on an express undertaking, for the due execution. For he undertakes and is trusted, on those

2 Str. 915.

Braddon B.3.

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Wheatly v.

Lov. Cro. T.

667. *Cogger*

v. Barnard.

L. Ray 909.

920.

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1 Powel Contr.
364-5.

1 Powel Contr.
331, 343.
2 Comm. 445
—6. 3 *Burr.*
1663.

2 Comm. 445
—6. 3 *Bac.*
Abr. 146.
Cowp. 290-4.

1 Powel Contr.
331-44.
Ld. Ray 909-
19.

Wheatly v.
Low, Cro. 7.
668. *1 Powel*
Contr. 365-6.

Brown & ux
v. Garborough
Cro. El. 63.

terms. This confidence of the bailor is a sufficient consideration for the undertaking of the bailee, and thus a contract is formed, which, without any valuable consideration, request, or writing, binds the bailee.

By the law of nature and nations, and, therefore, by the law merchant, which is founded on that law, a fair and deliberate contract is, of itself, and without any consideration to induce it, a good ground of action. But, by the civil law, if some consideration, other than the contract itself, do not exist, this bare contract, unless ratified by certain solemnities, bound not the party making it. The law of *England*, borrowing this principle, seems to have adopted it in its full latitude; and, holding a consideration necessary, never presumes one, unless the contract be confirmed by the deliberate solemnity of writing, sealing, and delivery.

A consideration is sufficient to support a promise, if it be either a benefit to the party promising, or a loss to him, to whom the promise is made, or if the party promising be under a legal, equitable, or moral obligation, to do what he promises: or if he, to whom the promise is made, trusting to it, foregoes an advantage, or suffers a consequential loss; as if one, without any consideration, promise to keep my goods safely; or a carpenter promise to repair my house; though they do not, no action will lie on this promise, until I suffer some loss, through their default; but if, trusting to such promise, I deliver my goods to this bailee, and he spoil them, or lose them; or, waiting for the carpenter to repair my house, according to his promise, which he neglects to do, I suffer damage; or if he does it unskillfully; for my loss, through the non-performance or misperformance of these undertakings, I may support an action.

Plaintiff, being indebted to *A.* delivered a sum of money to defendant, to pay over to *A.* Defendant paid it not. *A.* sued plaintiff, who thereupon sued defendant, for a breach of his trust and promise, and had a verdict. Defendant moved in arrest of judgment, because there was no consideration. This objection was over-ruled, and the judgment given was affirmed on error. Before the intermarriage of the plaintiffs, the father of the husband had promised to the wife, that, if the marriage took effect, he would assure them certain land. Defendant,

his cousin, standing by, promised her, if the father did not, that he would give her 100*l.* The marriage took effect, and the promise of 100*l.* was held good; not only because they were of kin, but because the woman trusted defendant, rather than the father of her husband.—The last is, of itself a sufficient, and, I think, the true reason. There was an agreement between plaintiff and *A.* that plaintiff should have a lease of *A.* with divers covenants. At the day of sealing, plaintiff refused, on account of the insertion of a new covenant, concerning repairs. Defendant, standing by, took on himself to make the repairs, if plaintiff would seal the lease. He did so, and, in *assumpsit*, this was held a good consideration, though the sealing of the deed was of no consequence to the defendant.

Mutual promises are considerations for each other; and a consideration very trifling will support a promise; as “if you shew me a deed, whereby it appears, rent is due, I will pay you;” or “if you will come such a day, I will pay you:” in these cases, the shewing of the deed, or the going to the house, is a sufficient consideration. But no consideration that is executed, and intirely past, from which no legal, equitable, or moral duty remains, will support a promise: for the promise being subsequent could not have been the inducement, which caused the consideration, and is therefore altogether voluntary and gratuitous. In applying this rule, we must distinguish those cases, where the consideration is not intirely past, but consisting of several parts making, in the whole, one transaction, of which though some part of it be past, some part yet remains to be executed.

As where one agreed to demise a shop to another, paying 40*s.* by the year; and for the perfecting thereof each gave the other one shilling. Afterwards, in consideration of the premises, lessee promised to give lessor 30*l.*; in consideration whereof, and in performance of the contract, lessor made a lease to lessee. It was held that the promise of 30*l.* was good. For the lease was after the promise. The agreement is in performance of all, not of part. It was lessor’s part to make the lease to the defendant, and his part to pay the rent and 30*l.* in consideration of his quiet enjoying. So, in *assumpsit*, plaintiff declares, that, in consideration that he had, on 10th December, bought land of defendant, afterwards, on 19th December, defend-

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v. Storer Dy-
er, 272 b, pl.
32. in not.
See 1 Powel
Contr. 345.
Cro. J. 342.
Hob. 4, 5.

1 Powel Contr.
343. Sturly
v. Albany,
Cro. El. 6.
150. Gilbert
v. Rudderhead
Dyer 2. 2. b.
pl. 32, in not.
1 Powel Contr.
348 52. Hunt
v. Bale Dy.
272, b pl. 31.
Barker v.
Halifax Cro.
El. 747.
1 Com. Dig.
142.

2 Bulstr. 73.
1 Powel Contr.
349.

Warcop v.
Morse, Cro.
El. 138. See
also Cro. El.
42. 94, 133.

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Dy. 272, b. 31.

3 Bulstr. 187.

1 Rolle Rep.

381. Rolle

abr. 12. pl. 10.

1 Powel Centr.

372. Dyer

272. b. 32.

Bosden v.

Thinn, Cro.

7. 18. Siden-

ham v. Wor-

thington, Cro

El. 42. Cro.

Car. 409.

Salk. 96.

Cowp. 294.

Cro. El. 42.

Dyer 272. b.

32 in net.

1 Powel Centr.

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ant promised to make him a sufficient assurance thereof, by such a day. After verdict, it was urged, that the consideration was past. But it was adjudged for the plaintiff; for the assurance was the substance of the sale and the transaction.

And, though the consideration be intirely past, if it was done, at the request of the party promising, the law, giving the promise a relation back to the request, holds it sufficient. If *A.* request me to give my credit to *B.* for 50*l.* I give my bond, am sued, and have to pay 70*l.* and I shew this to *A.* who promises to pay me 70*l.* this promise is good. So, though the consideration be past, if there be a subsisting duty, at the time of the promise, it will bind; as a promise to pay a servant wages, for past service, or to pay a debt barred by the statute of limitations, or contracted during infancy. So *assumpsit* lies for the burial expences of the wife or child of another, without request.

On the principles which have governed these decisions, no doubt can remain, that the promise, made by these parties, to the state of *Pennsylvania*, acting by its agent, the judge of Admiralty, is sufficient to support an action. Here is an undertaking and a breach of trust, which, without any consideration, is sufficient. Or, supposing a consideration necessary, and the order of the Admiralty to be the consideration, it was not altogether past; it was but part of a transaction, the most material part of which, and the principal object in the view of all the parties, the delivery of the money, like the execution of the lease, and quiet enjoyment under it, in one of the cases cited, or the execution of the conveyance, in another of the cases, remained to be executed by *Pennsylvania*, after the promise was made, and was a consequence of the promise; though the order of the court in this case, and the agreement for the lease, and for the purchase in the other cases, be stated as the consideration, and be previous to the promise. But supposing the consideration past, it was preceded by a request of the party promising. The order was made, on the petition of *Lacaze* and *Mallet*. And the whole transaction may be considered as mutual promises; on the part of the court, to give the money; and on the part of *Lacaze*, *Mallet*, and *Rofs*, that *Lacaze* and *Mal-*

2 Bulstr. 73.

Cro. El. 138.

let shall remit it to *Lanoix*. And, in almost every view that you can take of it, the promise is sufficient.

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But every promise, that is good in law, will not support every action: and there are promises, which, though they will support an action, will not support an action of debt.

Had all the plaintiffs in error been bailees, there would have been less difficulty in declaring the operation of such a contract, as this. But the difficulty arises from *Ross*, to whom the money was not delivered, being involved in the same contract with *Lacaze* and *Mallet*, to whom the money was delivered.

It is not a new thing, to consider parties to the same contract, as equally bound, for one purpose, but separate, for another. In an annuity contract, it was held, that the surety, though liable, on the express contract, for the payment of the annuity, was not liable, on the implied contract, on the annuity becoming void, to return the consideration money, which he had never received: but the principal was held liable, on this implied contract. I cite this case, not as parallel to the present case, for this is an express promise by all, but as shewing, that parties, equally bound for one purpose, may not be equally bound for every purpose of the same transaction. And here, it may be contended, that *Ross*, though liable on the special undertaking, to remit the money, is not liable in debt, for what he never received.

Rassall v. Avarne, 2 T. Rep. 366.
Powel Contr. 209-31.
Shove v. Webb, 1 T. Rep. 732.

Indebitatus assumpsit was brought on a bill of exchange accepted. There was a verdict for plaintiff, and a motion in arrest of judgment, because, though case lies on a bill of exchange accepted, on the custom of merchants (which requires no consideration) yet *indebitatus assumpsit* (which lies only where debt lies) cannot be brought thereon. It was held, that a bill of exchange accepted, though a good ground of a special action on the case, on the custom of merchants, does not make a debt, because the acceptance is conditional on both sides, if the money be not received, it returns on the drawer, who remains liable still, and this is but collateral; and because the word *onerabilis* does not imply debt; and because it is but evidence of a promise to pay, which is *nudum pactum*: but debt lies on it against the drawer himself, for he is really a debtor by the receipt of the money. Debt, or

1 Salk. 23.
1 L. Ray 69.
2 Burr. 1009.
Hardr. 485.
Brown v. London.
1 Mod. 285.
1 Salk. 23.
125. 2 L. Ray 1035.
2 Com. Dig. 64.
1 Vent. 198

1793. *indebitatus assumpsit*, lies not for interest of money due on a loan; for money won at play, or on a wager; nor on mutual promises; for there must be a consideration, a *quid pro quo*, to support debt, or *indebitatus assumpsit*:— but *assumpsit* lies in these cases. A declaration in *indebitatus assumpsit*, against a father, for money lent to his son, at the request of the father, is bad; for *lent* is a technical word, and creates a debt in the son, to whom it is lent, and cannot be lent to two; but it would have been good, if *delivered* to the son, at the request of the father: for then the *loan* had been to the father: but being now to the son, the father is only collaterally bound, and liable in a special *assumpsit*. So, though for goods sold, or service done, to another, at the request of a third person, debt lies not against him who requested; for the contract is by the *sale*, and the *service done*, yet being to another, there is no *quid pro quo*, and request, without more makes not a debtor; yet on a contract, to retain one, to embroider the gown of a third person, he has election to have debt or *assumpsit*. If one undertake, that if *A.* release his debt to *B.* he himself will be his debtor, debt lies not. *B.* retains *R.* to be miller to his aunt, at 10s. per week; debt lies not on this, but an action on the case: for, in debt it is requisite, that the benefit come to the party who promises; and so, for the want of a *quid pro quo*, debt does not lie: but this will support an action on the case; for though it be not beneficial to *B.* it is chargeable to *R.* Debt lies not on a collateral engagement, as for goods delivered by *A.* to *B.* at the request of *C.* which *C.* promised to pay, if *B.* did not; for in that case, a debt or duty does not arise between *A.* and *C.* but a collateral obligation only.
- 2 Com. Dig. 640. 1 Salk. 23, 123. 38 Salk. 14, 175. L. Ray 69. 1034. 1 Salk. 23. L. Ray, 84. 382. 224. 1 Esp. 13. Dyer. 230, pl. 56. Sands v Trevilion, Cro. Car. 107, 193. 2 Com. Dig. 639. 1 Roll. 504, 35. Dyer. 272. Hardr. 485. Sbandow v. Simson. Cro. El. 880.
- 2 Com. Dig. 639. 9 H. 5, 14. Baxter v. Read. Dyer, 272, in not.
- Hardr. 486.

Hob. 216.

1 Powel. Con. tr. 344.

Though changing the form of the action, change neither the justice of the demand, nor perhaps the amount of the recovery, these cases manifest a distinction between parties liable on the same contract, and in the forms, by which the same sum may be recovered. Perhaps the same distinction may be hinted in the following case.— Testator promised to pay the plaintiff 50*l.* if he would forbear to prosecute an attachment of privilege against him. On this promise, plaintiff brought an action on the case, against defendant, executor of the promiser. It was held, that the consideration was good, and that debt would

have lien against the testator, for 50*l.* being a sum due on a contract, in which he received *quid pro quo* : for, forbearing the suit was as beneficial in saving, as other things in gaining.

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If from these cases, it should be collected, that the ground of an action of debt is the consideration or equivalent given by the *debtee*, to the *debtor*, without which, either proved or presumed, no debt can be raised ; and that damage, arising from the breach of a promise, is a ground only for a special *assumpsit* ; it may be contended, that, though debt lies against *Lacaze* and *Mallet*, who actually received the money, it lies not against *Ross*, who received none of it, and is not bound by a specialty, for its remission or repayment. Though the receipt of the money created a debt or duty, in *Lacaze* and *Mallet* ; the promise of *Ross*, without such receipt, created none in him ; and raised only a covenant or *assumpsit*, for the breach of which, damages will be recovered.

But, it may also be contended, this action is not brought for the money intrusted to *Lacaze* and *Mallet*, but for a fixed penalty expressly submitted to by *Lacaze*, *Mallet*, and *Ross*, and acknowledged due by them to *Pennsylvania*, if *Lacaze* and *Mallet* did not perform their trust ; and, though it never was the duty of *Ross*, to transmit the money delivered to *Lacaze* and *Mallet*, it became his duty, as well as theirs, to pay the penalty, when they had failed to transmit the money delivered to them.

Actions for penalties are not favoured ; and the distinction between a contract for a real debt, and for a penalty, is not new in the law, even when the penalty is stipulated for, by the solemnity of a deed. A promise or single bill, by an infant, for a debt due for necessaries, is good ; but a bond with a penalty, for such debt, is void. A contract, upon good consideration, to restrain from trading in a particular place, is good ground of *assumpsit* ; but a bond or covenant, to pay a sum certain was held void, because it left not the matter open to a jury, to make the damages commensurate to the consideration and injury ; but, whatever might be the consideration or injury, made the whole penalty recoverable, in an action of debt. A later decision has, indeed, overruled this distinction.

1. Because the penalty is favourable to the obligor, as fixing the sum, for which, he may repurchase his trade.

1 P. Wms. 194.
Ayliff v.
Archdale.
Cro. El. 920.
Clerk v. Gov.
& Co. of
Taylors, in
Exchequer on
error,—and
judgment of B.
R. reversed,
3 Lev. 241.
March 77.
193. Moore
pl. 259. 279.
2 Leon 210.
Noy. 98.
1 Powell Contr.
169. Mitche
v. Reynolds.
1 P. Wms.
181, 197.

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2. Because it is his own act.
3. Because he can suffer only by his own knavery; and courts are not to protect that from paying too much.
4. Because restraints by custom of particular places may be enforced by penalties; and
5. Because, whether the contract be good or not, on consideration of the circumstances, is matter of law, not fit for a jury. It is true, since the equitable powers of courts have permitted no more than the real debt or damages to be recovered, the action of debt seems to have but the same effect as covenant; and the reason given, for the distinction above mentioned, loses its force. But it is also true, that the *first* reason, for over-ruling the distinction, is not applicable to the present case; for it can never be favourable to the obligor, to pay double the sum due. So also the *third* reason applies not to *Rest.* And the *fourth* and *fifth* reasons have no operation on this case. To over-rule the distinction in this case, there remains only the *second* reason. But this reason, whatever weight it may deserve, in support of a deed, must have less, when applied to a parole contract. For since words are frequently spoken inadvisedly, and without due deliberation, the same law, which requires a consideration to support such a contract, would perhaps hesitate, on a transaction of so little solemnity, to declare a penalty incurred.

Finn. Just.
Inst. 554.
1 Powel.
Contr. 330.

Preston v.
Tooley, Cro.
El. 74.

A special *assumpsit* seems to have been brought, on a case like the present. *A.* promised to *B.* that, if he would deliver to him a statute staple, which he had on *C.* for 1000*l.* to look at, he would keep it safely, and deliver it to *B.* or pay him 1000*l.* As, on the writ of enquiry, only 200*l.* damages were found, it seems reasonable to presume, that the 1000*l.* in the statute staple was a penalty, and the 1000*l.* in the promise, was therefore a penalty also; and, though a precise sum was promised, and the action was against a principal only, *assumpsit*, and not debt, was brought, on this promise. In the case before us, if *assumpsit* had been brought, I have no doubt, it would have lien: and, for the reasons which I have stated, I am inclined to think *assumpsit* the most proper form of action, on this engagement.

Lady Shan-
dois v. Simson
Cro. El. 880.

But, notwithstanding this opinion, and those reasons, which have given me very serious doubts, on this sub-

ject; as the boundary between *debt* and *assumpsit*, in some of those cases, appears to be nice, if not to shift from side to side; as, in the cases of retaining one to do a service to another, it is sometimes held, that debt lies, sometimes, that it lies not, but *assumpsit* only, and debt against the person, for whose use, the service is, and sometimes, that the person retained has his election of debt or *assumpsit* against the person retaining; as here is an express engagement, by all the plaintiffs in error, on a certain default, to pay a certain sum of money; as this is a promise, on a good consideration, and as a promise, on a good consideration, binds, without deed, and the use of a specialty is, that a consideration is implied; and, as the only effect of giving way to my doubts would be, to change the form of the action, delay justice, and add to the loss and vexation of the injured party; I will not, at this state of the proceeding, say, that this action shall not be maintained. As it is undecided, that no action lies on a stipulation, and doubtful whether this be a judicial proceeding; yet, being a fair, deliberate, and solemn contract, the strong principles of justice require, that a remedy should be administered; and this *may* be a proper remedy.

But, supposing a proper form of action to have been chosen, unless it have also been properly prosecuted, the proceeding will be erroneous. The *fourth* question, therefore, remains to be considered.

4. Is a breach of this stipulation sufficiently set forth in the declaration?

I am of opinion, that, after defence, verdict, and judgment, we ought to presume, that *Lanoix* was owner of this money, and, of course, that a breach is sufficiently set forth, to support this record. It appears in the information, that *Lacaze* and *Mallet* themselves stated this in their petition; shall they now deny it? Unless *Lanoix* had been the owner of the money, would they not have controverted it? And is it not established by the verdict for his use? If he had not been the owner of the money, the defendants would have so pleaded or shewn it, in discharge of themselves from the present action. It is averred, in the words of the stipulation, that *Lacaze* and *Mallet* did not perform the trust reposed in them.

I

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2 Roll. 77.

2 Com. Dig.

638. Cro. Car.

187, 193.

Dyer 230, b.

56. Bradford

v. Woodhouse

Cro. J. 520.

H. Bla. 241.

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And, even, if the money belonged not to *Lanoix*, it is better, that it be in the hands of the Commonwealth, as a trustee for the true owner, than in the hands of *Lacaze* and *Mallet*, who have no privity or connection with the owner, if he be not *Lanoix*; and who have not performed their trust.

I am, therefore, of opinion, that the judgment given in the Supreme court be affirmed; and I am pleased to find no sufficient reason, to obstruct its effect, and longer delay the payment of a just debt.

Judgment affirmed.

ABRAHAM STONE, plaintiff in error, v. MICHAEL FURRY.

THIS case was argued, at *July* term, 1793, by *Serjeant* and *Todd*, for the plaintiff, and by *Ingersoll* and *Tilghman*, for the defendant in error.

The opinion of the court, delivered by the president, on the 17th of *July*, 1793, comprehended a state of the case and affirmed the judgment.

CHEW, PRESIDENT. An action on the case, brought in the court of Common Pleas of *Berks* county, by *Michael Furry* against *Abraham Stone*, was removed by *habeas corpus*, into the Supreme court, of *April* term, 1784. The declaration had three counts.

1. The first count was special, and stated, That, whereas *Furry* and one *Minich*, on 21st *February*, 1775, had purchased a plantation from one *Swan*, and, in part payment, had given ten bonds, each in the penalty of 100*l.* and, for the payment of 50*l.* in successive years, at and from 1st *May*, 1780; and whereas, on 10th *February*, 1777, in consideration that *Michael Furry*, at the request of *Abraham Stone*, had sold the said plantation to *Abraham Stone*, and taken, in part payment, ten bonds on *Abraham Stone*, and *Peter Stone*, in the same penalties, and conditioned for the same payments, at the same times, as specified in the bonds of *Furry* and *Minich* to

Swan, the said *Abraham Stone* had assumed to the said *Michael Furry*, that he would pay the bonds of *Furry* and *Minich* to *Swan*, and deliver them up to *Furry* at his house in *Tulpebaken*; and whereas, on 10th February, 1780, the money being unpaid, *Abraham Stone*, in consideration, that *Furry* would receive of him the sum of 500*l.* in continental bills of credit, then current in discharge of his and *Peter Stone's* bonds, promised to pay to *Furry* all such damages and loss, as he should sustain, by accepting the continental bills, in lieu of delivering up to *Furry* the bonds given by *Furry* and *Minich* to *Swan*; thereupon, *Furry*, trusting to this promise made by *Abraham Stone*, afterwards, on the same day, received the continental bills in discharge of the obligations of *Abraham Stone* and *Peter Stone*, and in lieu of the obligations of *Furry* and *Minich*, which *Abraham Stone* had agreed to deliver up to *Furry*; and that afterwards, on the same day, *Furry* thereby sustained damage 400*l.* whereof *Abraham Stone* had notice. 1793.

2. The second count is on a general *indebitatus assumpsit*, for 400*l.* had and received by *Abraham Stone*, for the use of *Michael Furry*.

3. The third count is on a general *indebitatus assumpsit*, for 400*l.* laid out and expended, by *Abraham Stone*, for the use of *Michael Furry*.

General damages are laid 500*l.*

This case was tried at *Nisi Prius*, 31st May, 1792, when a verdict was given for the plaintiff for 678*l.* 13*s.* 2*d.* damages, and 6*d.* costs. Judgment *nisi* was entered on this verdict, on the 1st day of September term, 1792.— And, in the same term, on 14th September, 1792, a writ of error, regularly taken, according to law, out of this court, was presented to the Supreme court, in behalf of the defendant in the Supreme court. Afterwards, on motion in behalf of *Furry*, the plaintiff in the Supreme court, there was a rule made by the Supreme court, that the defendant in that court, who is the plaintiff here, should shew cause, why 178*l.* 13*s.* 2*d.* part of the verdict, being the damages found exceeding the sum laid in the declaration, should not be remitted, *Furry*, the plaintiff in the Supreme court, paying the costs of the writ of error, and of the rule. On argument of counsel on both sides, this rule was made absolute on

1793. 15th September, 1792, in the same term, and judgment rendered for 500*l.* damages, and sixpence costs, with 32*l.* 1*s.* 11*d.* costs of increase.

Error has been assigned, that the jury had assessed damages 638*l.* 13*s.* 2*d.* when *Ferry* had stated in his declaration, that he had suffered damages only to the amount of 500*l.* The general errors have been assigned, and, *in nullo est erratum* pleaded.

The counsel for the plaintiff in error have made the following objections:

Personal v.
Spencer, Telv.
45. 2 *Bac.*
abr. 4, 5.

1. After final judgment, writ of error, and security to prosecute, the Supreme court could not amend its record, by entering a *remittitur* of the surplus damages, and giving judgment only for the sum laid in the declaration: though this might have been done before judgment, and writ of error.

Tender laws.
Acts of Assembly
from Jan.
1771 to June
1780.

2. The acts of Assembly making paper-money a legal tender, render it illegal to bargain for a premium for accepting a payment in such currency. No action will lie on a promise founded on an illegal consideration. The law made paper-money equivalent to coin; and if coin had been paid nothing farther could have been demanded on these bonds. And supporting this action would open a door to a vast flood of law-suits, and countervail the tender laws.

5 *Vin.* 175-9.
6 *Vin.* 444-6.
3 *Vin.* 348-55
4 *Bac.* 14.
1 *Esp.* 134.
5 *Com. Dig.*
43-4.

3. This promise is to pay money due on a specialty, and no action of *assumpsit* lies on such promise; for it will not bar an action on the specialty itself.

Doug. 654.

4. The declaration has four counts, for that, which appears as the first count, is, in fact two; and there are only three averments of breach. The breach of this promise is ill laid. Averring generally, that he has suffered damage is bad, without shewing how; for it might have been *damnum sine injuria*, arising by the default of *Ferry* himself, and no fault in *Stone*. The promise was to make good the damage; and there is no averment, that this is not done, but only, that *Stone* had notice.— True, this is after verdict; but in an action on a bill of exchange, after verdict, judgment was arrested, because no sufficient cause of action was stated. If this count be bad, the verdict being general on all, no judgment can be given.

Doug. 703.
4 *Bac.* 9.

On these points we are of opinion:—

1. As to the first objection, the amendment being made during the term in which judgment was entered, there can be no doubt, but the Supreme court had full authority to make it. We think the amendment made on good grounds, necessary for expediting justice, and not to be controverted.

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French v. Cornely's, 1 Bla. 453.

Pickwood v. Wright, H. Bla. 643.

2 Bla. 517.

2. The second objection is sufficiently answered, by observing, that none of the debt was due, when the paper money was tendered. *Furry* was not then bound to accept it, and might, therefore, lawfully annex a condition to his acceptance; and this condition might be a good consideration for an *assumpsit*, especially as it was only the fulfilment of a former promise, in consideration of which these bonds were accepted as payment. As to opening a door to law suits, few, if any, such express promises were made, or if made, they will now be barred by the statute of limitations; or if honest and valid, like this, they ought to be performed. The bonds alone were not taken in payment of the plantation; but the bonds and a promise. Payment of the bonds in specie, would not have discharged the promise also: relinquishment of performance of this was a good consideration of another promise.

3. This is not an action for the money due on the bonds, but an action on the promise to indemnify *Furry*, for accepting the paper money, instead of performance of a former promise, to discharge and deliver up the bonds in the hands of *Swan*. The bonds and promise might have both been sued on; and a suit on the one ought not to bar a suit on the other. If the one suit ought not to bar the other, the objection, that it will not, has no force.

4. No doubt, this declaration is very inartificial; and were a question on the first count before us, in the way of demurrer, we should have very little hesitation, to declare it bad, and give judgment for the defendant.— But a defendant, who, knowing that a declaration is bad, lies by, and pleads the general issue, takes his chance of a jury trial, and obtaining the advantage of the disclosure of the plaintiff's testimony, comes forward, on grounds foreign to the merits, and of which he before had and omitted an opportunity of availing

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*Collins versus
Gibbs, & Burr.*
899.

himself, and desires another chance with a jury, is surely not to be favoured. The defendant might have demurred, or pleaded so as to bring out a good assignment of a breach, and averment of damage. Since he has not done this, we will make every possible construction, to sustain the verdict.

In an action on the case on *assumpsit*, the plaintiff's declaration did not aver performance of a condition precedent; and, therefore, after judgment by default, and writ of enquiry, defendant moved in arrest of judgment. Lord Mansfield, in delivering the resolution of the court, said, that a motion in arrest of judgment by default, came before the court exactly as if it had been on demurrer; and is not like the cases of objections to judgments after verdict. The want of averment cannot be made good in this case; and the true distinction, as to supplying such defects, is whether the objection be made after verdict or not.

We say, therefore, that in this declaration, there are but three counts. The first count states a promise, on a complex consideration, and damages arising to the plaintiff, from his confidence in this promise. How these damages arose, ought to have been stated specially; but it is not. Averment of a failure to indemnify ought to have been made; but it is not. But as a verdict, though it will not cure a defect of title appearing in the declaration, will cure a title defectively set out; as a promise, and damage arising out of it to the promisee, are here stated; this lays, though imperfectly, a ground of action; and all necessary circumstances must have been proved at the trial.

2 Wils. 261.
3 Wils. 275.
Courp. 826.
1 Wils. 172.
4 Burr. 2020
2 Str. 1011-2.
1 T. Rep. 145.
1 Med. 42, 43

As we think, therefore, that the first count, against which only there are objections, is aided by the verdict; the last objection falls to the ground.

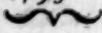
Here then is a voluntary promise made by a debtor, in consideration, that a creditor would accept a payment of a debt not then due, in a currency depreciating, in a rapid progression, and, very soon afterwards, entirely extinguished. The damage of the receiver is manifest; for, if the payments had been delayed (and *Furry* might have delayed them) till the times when they became due; no paper money could have been tendered, but to the first bond. This damage being stated and proved

to have arisen from a binding promise made and broken, and not compensated, a good ground of action is stated on the declaration, and proved at the trial. We, therefore, hold, that the declaration, imperfect as it is, is now aided by the verdict; and we affirm the judgment given by the Supreme court.

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GEORGE FITZGERALD, for the use of MOOR and JOHNSTON, v. ANDREW CALDWELL, survivor of JAMES CALDWELL, his late co-partner.

A SUIT had been brought in the court of Common Pleas of *Philadelphia*, to *September* term, 1787, by *Fitzgerald*, for the use of *Moor* and *Johnston*, against *A. Caldwell*, and removed into the Supreme court of *September* term, 1787, on a note given to *Fitzgerald*, as agent of one *Vance*, for a debt due to *Vance*. The note was transferred to *Moor* and *Johnston*, for a debt due to them, by *Vance*. At the suit of other creditors of *Vance* foreign attachments were issued against him, and the debt, for which the note had been given, was attached by them in the hands of *Caldwell*; who pleaded this to the suit on the note which was then referred to referees, to report what sum was due by *Caldwell* to *Vance*, and what to *Fitzgerald*; subject to the opinion of the court on a case to be stated, or, if no case should be agreed on, to the determination of the court and a jury, so far as respected the attachments pleaded. The referees reported 3778*l.* 11*s.* 1*d.* due to *Vance*; or 5705*l.* 12*s.* 3*d.*, due to *Fitzgerald*. There was judgment on this report: but both were set aside, by agreement, and the matter referred back to the same persons; who then reported 4016*l.* 9*s.* 4*d.* due to *Vance*, or 5009*l.* 5*s.* 1*d.* to *Fitzgerald*. On this report, judgment *nisi* was entered, for 5009*l.* 5*s.* 1*d.*: and, on 2d *January*, 1792, "it was agreed by the parties, that the judgment rendered, for the sum found by the referees, be absolute; but shall await the trial of the attachments, and, if any thing

1793.  should be recovered thereon, against *Caldwell*, the same shall be defalked out of the said sum, for which judgment was rendered, as aforesaid, and execution shall issue for the residue only." One of the attachments having been tried, and the jury having found (as the debt had been previously assigned) that *Caldwell* had no property of *Vance's* in his hand; there was judgment on that verdict. Whereupon, on motion, that, the money having been tied up in *Caldwell's* hand, by attachment, no interest should be charged on it; the Supreme court ordered, that *Caldwell* be discharged from the said judgment, on the payment of 4016l. 9s. 4d. viz. the principal sum found due to *Vance* by the said report of the referees. To reverse this order, and have the effect of the judgment for 5009l. 5s. 1d. a writ of error was brought in behalf of the plaintiff, to remove the record into the high court of Errors and Appeals. Here it was argued, in July term, 1793, by *Tilghman*, *Wilcocks*, and *Lewis*, for the plaintiff; and by *Sergeant*, *M'Kean*, and *Ingersoll*, for the defendant.

On 18th July, 1793, the president delivered the opinion of the high court of Errors and Appeals, reversing the order of the Supreme court, for lessening the judgment; and affirming the judgment for 5009l. 5s. 1d.

The following are short notes, which I took of his argument.—

The first agreement of reference is a leading feature in the cause, accurately expressed; well understood by parties, counsel, and court; approved by the court, and put on the record; binding all, and to be enforced not infringed by the court.

All this was done, so far, by court, referees, and parties.

But a case remained to be stated and argued, and decided by the court, or to be tried and determined by the court and jury. It is the province of a jury, to settle facts; of a court, to declare the law. The verdict, on the *scire facias* in the attachment, found nothing in the hands of the defendant. Of course, at the time of the motion, and the order of court, no defalcation was to be made, under the second agreement. The judgment was for the sum due to *Fitzgerald*. The court order defendant to be discharged, on payment of the principal sum, or that found due to *Vance*.

The first agreement gave no such authority for this order. For no case had been stated, and no trial by jury had been had. The exceptions to the first report were not, that interest should not be paid on money attached, nor that the agreement was misunderstood, nor that judgment was entered *nisi*, on the wrong sum. The question of interest on money attached was not submitted to the referees, and could be no part of their report, nor, of course, of the judgment on the report.

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Neither the first nor the second agreement, nor any thing appearing on the record warrant the judges of the Supreme court, to lessen the judgment entered:—And the consent of the parties to enter it restrained them. Yet, without any reason appearing, they have changed the judgment entered by consent, and made a new one, at another term, than that in which it was entered.

If courts can do this, trials by jury or reference, and judgment by confession, will be a nullity, when without any reason appearing, a court will discharge a defendant for a less sum. If they may discharge for a less, they may refuse to discharge but for a greater. This order is to be taken in the nature of a judgment, being decisive on the rights of the parties: and to say, that, because it is not in the form or expression of a judgment, when it has all the effect of one, therefore, it is not a judgment, and no writ of error lies on it, would leave courts at liberty to do that informally and covertly, which they could not do openly and regularly.

We mean not to say, that a court cannot, in any case, after judgment, prevent a party from recovering more under it, than the judgment gave him. We have nothing to do with the question of interest on attached money. We look only to the record; and it, from the deliberate consent of the defendant, bound up the court from doing what has been done.

The judgment, therefore, of this court is, that the last decretal order of the Supreme court be reversed; the judgment given for 500*g*. 5*s*. 1*d*. and costs be affirmed; and the record be remitted into the Supreme court, that justice be done thereon.

ALLEGHENY

ALLEGHENY COUNTY,

September Term, 1793.

JEREMIAH BARKER, v. WILLIAM SUTHERLAND.

THE declaration stated, That whereas, one *Jacob Whitfel* requested the plaintiff to sell him a quantity of goods of the value of 75*l.* in consideration of which, *Whitfel* would deliver to the plaintiff a power of attorney from him and *Lewis Whitfel*, to receive their pay, as soldiers of the United States; that plaintiff refused, and that thereupon defendant assumed, that 75*l.* was due to *Jacob* and *Lewis Whitfel*, and that he would be answerable; in consideration of which, and, at the request of defendant, that plaintiff delivered to the said *Jacob* goods to the value of 75*l.*; that only 37*l.* 10*s.* of the said pay was due; and that action accrued to plaintiff to demand of the defendant 37*l.* 10*s.* which he, though requested, had refused to pay.

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The following receipt of *Jacob Whitfel* was proved, and read to the jury:—

“Received July 28th, 1791, of *Jeremiah Barker*, the sum of 75*l.* in full for my own and *Lewis Whitfel's* discharges or arrearages of pay and cloathing, due from the United States. Witness my hand,
“*Jacob Whitfel.*”

There was also evidence of the purchase of the goods, and of *Sutherland's* assurance, that so much was due, and that *Jacob Whitfel* would not sell what he had not authority to sell. And proof was given that 37*l.* 10*s.* was received, but that payment of any thing on account of *Lewis Whitfel* had been refused at the War office.

Jacob Whitfel (admitted by consent) proved that he had called on the defendant only to judge of the value of the goods, that he heard no such assurance given, and that he requested none.

Woods, for defendant. Here was no express engagement on the part of *Sutherland*, but merely his opinion

1793. and belief, that *Whitfel* was, as he really is, an honest man. If there were, or even if the action were against *Whitfel*, there is no evidence, that the account at the war-office is finally closed, or that more money has not been received. Engagements of this kind must be special, and, in *England*, must be in writing.

Brackenridge, for the plaintiff. The *English* statute of frauds extends not here. We have a statute of our own, and this case is not within it. We have given sufficient evidence, that we have not received at the war office, the amount which we paid to *Whitfel*, and which *Sutherland* was to have made good; and we have been refused any more. This is enough for us. If more has been received, let the defendant shew it.

PRESIDENT. Were this a case within the statute of frauds in *England*, that statute is out of the question here. Evidence has been given that 100 dollars have been paid, and that payment of the rest has been refused, at the war office. This is a good ground of action for the deficiency.

The question, whether *Sutherland* be liable or not, depends on this, whether the words of *Sutherland* amounted to a warranty, or only a representation. They may bear either sense; and you must judge how they were understood by the parties. If this be only a representation, and if it be fair and honest, as to his belief, and without concealment of truth, or interest; he is not liable. If this be a warranty, he is liable, however honest, full, and disinterested it may be.

The jury found for the defendant.

PHILIP, a negro man, *qui tam*, v. ABRAHAM KIRKPATRICK.

1St. L. 193. THIS was an action of debt for 20*l.* a penalty on the act of assembly against usury.

John Black bound his son *Daniel Black*, a boy of fourteen years of age, to *Kirkpatrick*, by indenture, dated 8th April, 1792, until *J. Black* pay *Kirkpatrick* a bond of the same date of 20*l.* being cash lent. *Black* was to find his son in sufficient clothing during his service; but if

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not, and *Kirkpatrick* did it, *Black* was to repay it. If *Kirkpatrick* sent the son to school, *Black* was to pay for the schooling, and make up for the time lost. *Kirkpatrick* was to find the son in sufficient meat, washing, mending, and lodging. The bond mentioned was given by *J. Black* to *Kirkpatrick*, for the payment of 20*l.* being cash lent. There was a penalty of 40*l.* in it. The lad served *Kirkpatrick* four months, and twenty days, and got no cloaths from him. *J. Black* then paid *Kirkpatrick* 20*l.* but he would not give up the bond, till he also paid him 9*s.* and 4*d.* as interest on it. This *J. Black* also paid him; but said this was not according to the bargain.

Ross and *Woods*, for defendant. This is not usury, but a fair transaction. Where there is a risk of loss of the money, or a failure of payment, at a day fixed, more than legal interest may be reserved. The service of the borrower's son was a pawn or security for the payment of the loan. Possession of a house may be given as a pawn; a pawn may be used, and yet interest may be taken.

Brackenridge, for plaintiff. This is not a case of risk. The service of the boy was the agreed compensation for the use of the money. If one to whom possession of land was given, as a security for debt, retain the possession, after he has received all that was due from the profits of the land, it is usury.

Hawk. 327.

PRESIDENT. If money be lent, payable on a contingency, which may never happen, as the arrival of a ship, more than legal interest may be reserved on the payment, and it is not usury: for the lender risks the loss of the whole. But wherever the principal is payable at all events, and the risk only applies to the interest, no more than legal interest can be reserved. The principal was secure here, in the legal view of security: for a bond was taken for absolute payment. The possible or probable insolvency of the borrower is not one of those risks, which the law has, or, agreeably to its intention, can have in view; and will not justify taking more than legal interest. If the only object of the indenture was to give a security for the money lent and interest, a security, which, while it might be a gain, might, as if in this case the lad had become sick, be none, or might be a loss; the defendant might lawfully carry this agreement

Sharpley v. Hurrel. Cro. Ja. 208.

Roberts v. Trenayne. Cro. J. 507.

1793. into execution, by enjoying the benefit of the security (since the loss might also have fallen on him, and so reduced even his principal sum) and exacting interest also; and, on this supposition, you ought to find for the defendant. But if the meaning of the contract was, that the indenture and probable service of the son was equivalent to the interest of the money borrowed by the father; then exacting interest afterwards was usury, the money lent is forfeited, and you ought to find for the plaintiff. If the indenture were, of itself, sufficient to ascertain the intent of the parties, we should feel ourselves bound to give a decisive opinion. But as it does not exclude the reservation of interest besides (as the words "cash lent," might have been inserted with a view to interest) we leave it to be explained by other circumstances; only declaring our opinion, that, from the nature of the transaction, and the provision in the indenture, that the time, which might be lost at school, should be made up to the defendant, it was the meaning of the parties, that the indenture and service should be equivalent to interest. If a certain gain was reserved in the contract, to the lender, besides interest; the contract is usurious. And if, without any express reservation, in the contract, a certain gain, uncompensated by expence and risk, was taken; this taking is usurious. If the taking be usurious, you ought to find for the plaintiff.

The jury found for the defendant.

4T.Rep.353.

NOTE.—The case of *Morse v. Wilson*, of all which have come within my knowledge, most nearly resembles the preceding. To secure the repayment of a loan of 2000*l.* with five *per cent.* interest, a bond, in the penalty of 4000*l.* was given; and also, in further security, an assignment of two shares in a brewery, valued at 1000*l.* each; the surplus profits of which, together with five *per cent.* interest, the lender was to receive. Here it was argued, that, though the lender, by this agreement, was not subjected to the losses in trade, yet, from his reception of the profits, he was, with respect to others than the partners, liable for the partnership debts; which might risk, not only his interest, but his principal advanced. But the court held it a clear case. For not being liable, with respect to the partners, for the losses in trade, his principal was no farther risked than, in the case of every lender, by

the insolvency of the borrower ; from his being liable to debts, on the insolvency of the partners.

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It will be observed, that if in this case, the lender had been immediately liable to losses contingent, it would not have been usury, and that, in the case of *Kirkpatrick*, my opinion went on the ground, that, from the relation of master and servant, he was immediately bound to maintain and provide for the borrower's son, in case of sickness, without any compensation or recourse, on the son, the borrower, or any person whatever; and that this contingency might have affected even the principal lent.

The decisions in England seem to go very far, to suppress usury. Compare the case of *Doe v. Barnard*, with the last point in the case of *Musgrove v. Gibbs*.

Esp. Ca. Nl.
Pri. 11.
Dall. 216.

WESTMORELAND COUNTY.

September Term, 1793.

JAMES CARNAHAN, Assignee of ADAM CARNAHAN,
v. JOHN HALL.

TO an action of debt on a bond, dated 20th *April*, 1784, and assigned 22d *April*, 1789, the defendant pleaded payment, with leave to give the special matter in evidence.

Woods, for the defendant, stated, that this bond (with others) was given in payment for a tract of land, the greater part of which was affected by a prior adverse title. To prove this, after producing an article by *Adam Carnahan*, of the same date with the bond, for the sale of a tract of land to *Hall*, and conveyance of the land, of the same date, warranting it against all former rights; he produced an office copy of a survey, reciting it as made for *George Risler*, 23d *September*, 1776, on a warrant granted 20th *August*, 1776.

Brackenridge and *Young*, for the plaintiff, objected to this testimony, for two reasons—

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1. Because *Hall* has never been evicted, but is still in possession of the land; and the plaintiff is not, in this action, called on to make good his right against an adverse title.

2. Because, if evidence of want of title might be given, this evidence is improper to be received, without first shewing the warrant, on which the survey was made: for the best evidence must be produced, or the want of it accounted for, before an inferior kind can be received; and the want of the warrant, unexplained, founds a presumption, that, if produced, it would make against the defendant.

Ross, for the defendant. We are not now trying an ejectment; but shewing why, on equitable grounds, the money should not be paid now.

But it was agreed, that the evidence be admitted; but the points be reserved for the opinion of the court, and be made part of the record, so as to be examinable on a writ of error.

The survey offered was then shewn, containing 345 acres, and it was proved, that 266 acres of it was of the lands sold by *Adam Carnahan* to *Hall*.

There was a verdict for defendant.

At *December* term, 1793, the opinion of the court was delivered on the reserved points.

PRESIDENT. In this case two questions have been reserved for our opinion—1. Can want of title, without eviction, be given in evidence, in an action for the price of land sold?—2. Can a survey be given in evidence, before the warrant is shewn?

1. In an action for money due, the price of land sold, can the defendant give in evidence want of title in the plaintiff, at the time of the sale, and an adverse title in a third person, before any eviction or claim of this third person, and while defendant is in possession of the land sold.

Want of consideration may be given in evidence.—What would be a ground for an injunction in Chancery, ought, in *Pennsylvania*, to be given in evidence. This is the most natural and effectual remedy. Possession of land without title, when a sale is in view, is nothing; it arises from a trespass, and can be no consideration, to make the price of the land a debt due. The

possessor remains liable to the true owner, and ought not to pay twice. The man, therefore, who, intending to buy a title, gets only possession, gets nothing; and pays his money, or gives his bond without consideration. If the seller think it a consideration, let him come forward, and indemnify the buyer, against the owner. His refusing to do this is an acknowledgement of want of consideration.

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Why then should not the defendant be allowed to give this want of consideration in evidence? Is the situation of the plaintiff worse, because the defendant has not been evicted? I think not. If a suit had been brought, to evict defendant, it would have been the duty of the plaintiff here, to defend the possession and title, which he sold. If the defendant had been evicted without collusion, the judgment would have been conclusive on the plaintiff. The plaintiff must, at all times, be presumed to know his own title; and now the burden of displaying and establishing the adverse title, falls on the defendant, who must shew want of title in the plaintiff, to make out want of consideration.

Our rules of practice appear to me well enough calculated, to prevent surprise on either party. The plaintiff could not be surprised, but from his own carelessness. No surprise is pretended. The special matter may be required to be previously set out. Complexity of pleading or evidence may be prevented, by an application to the court, who, I think would have it in their power, to reduce the matter, either of pleading or evidence, into such a compass or form, as not to perplex either the jury or the opposite party. May not a court as well prevent any improper complexity of evidence, as an improper multiplicity of pleas, or an improper multiplicity of counts in a declaration or indictment? *3 T. Rep. 106.*

Unless there be a difference in this respect, which I cannot see, between lands and goods, this point has been determined long ago; and want of title, without eviction, is warranted by precedent, as a good ground to recover back a price paid. Surely, then, it ought to be a good ground to prevent a payment. An action on the case was brought against L, for deceitfully selling sheep, affirming them to be his, when, in fact, they were the

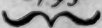
*Furnis v.
Leicester Cro.
J. 474.*

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sheep of *A.* There was a verdict for the plaintiff, and a motion in arrest of judgment, on this, among other grounds, that it was not shewn, that the plaintiff had any damage, or that *A.* had retaken them, or sued him for them. But this objection was overruled, and judgment was given for the plaintiff: for if he would tarry, till the goods were taken from him, it might peradventure be mischievous to him, and he should be without remedy. I lay no stress on the distinction between that and the present case; that, in that case, the question came directly, in this incidentally, into view: for this distinction can only be regarded, to prevent surprize. In that action, want of title was the ground of the demand; in this, it is the ground of the defence. I place them on a footing. If a man could recover back, *a fortiori*, he shall not pay. If this matter could take back the price out of the pocket of the seller; shall it not keep the price in the pocket of the buyer? If it would support an action, shall it not defeat one? Or shall the plaintiff recover money to-day, merely that he may be made to refund it to-morrow? I am of opinion, that evidence of want of title, without eviction, is proper in this action.

2. Can an office copy of a survey be given in evidence, without first producing the warrant, on which it was made?

I see no difference, in this respect, between this action, and an ejectment. For the defendant must pay, unless he can shew want of title in the plaintiff, and, of course title in another. So the question is the same, as in ejectment. Evading payment is taking from him the land. The question *cui bono*, for what use, should the survey, without a warrant, be admitted, may well be asked. The only ground, on which the survey, without the warrant, could be admitted, so far as I can see, is that, from the survey, the jury might presume a warrant. From an arrest, by a lawful officer, a warrant is not presumed. And, in this case, without any other circumstances explaining the absence of a warrant, which is the best evidence of an inchoate title, and in the power of the party; the presumption must be the other way. From its not being produced, the presumption is, that a sufficient warrant does not exist; if it do not exist,

there is no adverse title shewn; and if no adverse title be shewn, the verdict ought to be for the plaintiff.— 1793. 
The evidence of a survey, therefore, without a warrant, being inadmissible, there must be a new trial.

NOTE.—This case never came on again; I believe, because it was known that a warrant existed, and because more had been paid to *Carnahan*, than the value of the land for which he had title.

HENRY WOODS v. GEORGE NIXON.

IN replevin for a horse, the following case was submitted to the opinion of the court, to fix also the damages in case of judgment for the plaintiff.

David Tate, in the Summer of 1791, bought a certain number of pack-horses, for the use of the army under general *St. Clair*, from *George Nixon*, at 8*l.* 15*s.* each. *Nixon* delivered all but one now in question, which had strayed. *Tate* going on the campaign of 1791, met *Henry Woods*, to whom he owed a debt: he gave him an order to *Nixon* to receive this horse, which he had heard had returned, that he might keep the horse, till he was satisfied of this debt. *Woods* demanded the horse of *Nixon*; who refused to deliver him on the order, and following *Tate*, and pretending as a reason a quarrel with *Woods*, procured from *Tate* an order to deliver the horse to his son. *Nixon* did not inform *Tate's* son of this order, nor offer the horse to him, till after *Woods* had brought this suit. Then the son refused to accept the horse, because *Woods* had sued.

Young, for the defendant, made two objections to this action.

1. No action lies in the name of *Woods* against *Nixon*, on this transaction; but only in the name of *Tate*.
2. Even *Tate* could not have brought replevin for the horse, which was never delivered to him, and of which therefore the property was not changed. Much less can *Woods*, to whom no delivery can be presumed.

1793. *Ross*, argued for the plaintiff, that this action lay in name of *Woods*.

At *December* term, 1793, the opinion of the court was delivered.

PRESIDENT. I will make three questions—1. Whether *David Tate* could have maintained any action for this horse?

2. Could he have maintained replevin for him?

3. Can *Henry Woods* maintain this action?

1. The objection, on the first question is "that there was no delivery of this horse, and till delivery, the property is not changed."

Right and enjoyment are two different things; and the one may be perfect without the other. The property, or right, abstracted from the possession, arises from the contract; and is vested in the buyer, by the assent of the seller, who, from the time of the sale, is indebted to the buyer for a thing in kind. These principles apply to both parties. For as, if a horse be sold, and die in the stable of the vendor, between the sale and the delivery, the vendor may have debt for the price, the horse being the horse of the buyer from the sale; so, for the same reason, if the horse live, and the seller refuse to deliver him, the buyer, tendering the price, may take the horse, or have detinue for him. In the case before us the price was paid. I should be disposed to consider *delivery* only as the conclusive evidence of the completion of a previous contract, which, without the symbol of delivery, had vested the right in the buyer. But there are other circumstances, which render this case stronger. The contract was entire, for a *parcel* or *certain number* of horses, and it cannot be severed at the will of one of the parties. He cannot deliver the worst horses, and retain the best. Delivery of part, without any new reservation expressed, and acceptance of the whole price, as completely executed the contract, as the circumstances could admit; and the horse coming into, or remaining in, the possession of *Nixon*, came into, and remained in, his possession, as the horse of *Tate*. *Nixon* was a mere trustee, bailee, or finder, like any other *bona fide* possessor; and his being liable to refund the money can make no difference in the property of the horse: for that arises from his obligation to deliver the horse safely, and his retaining him contrary to his duty.

3 *Reeve Eng.*

Law 273-4.

2 *Powel*

Contr. 64.

2 *Comm* 447

—8 *Noy's*

Max. c. 42.

p. 86-8.

Comb. 341.

Lofft. 121.

2 *Str.* 166-7.

A husband, seized of land in right of his wife, sold 1793.
 400 trees for 20*l*.; and half were taken away, and half
 of the price paid. The wife died, the heir entered, the ³ *Reeve Eng.*
 husband brought debt for the other half of the money, ^{Law 374.}
 and it was held good: the contract being good, at the ² *Porvel*
 time, and entire, could not be severed, having taken part, ^{Contr. 64.}
 he might have taken the whole, in the lifetime of the ^{See also 2}
 wife. I argue, as before, the principles apply to both ^{Mod. 243.}
 parties; the remedy is mutual. If seller can bring debt ² *Comm. 447*
 for the price, buyer may bring detinue for the thing ^{—8. 2} *Str.*
 sold. Detinue lies for him who has property, even ² *Com. Di.*
 though he never had possession, or his property be spe- ^{632. Bull Ni.}
 cial, as, by heir, for an heir loom, by husband, for goods ^{Pri. 49. 50.}
 of wife, by buyer, for goods sold, or by bailee, or against
 bailee by him for whose use goods had been delivered.
 It lies, after performance of the condition, to recover *Bateman v.*
 back goods sold and delivered on a certain condition. *Ellman. Cro.*
 It was agreed between plaintiff and defendant, that *El. 366.*
 plaintiff should exchange his ship *F.* for the defendant's *James, versus*
 ship *R.* and give 25 guineas to boot, and, if the *F.* ^{Price, Lefft.}
 should be lost in the voyage she was then upon, 30 ^{219.}
 guineas more. Plaintiff paid defendant a guinea earnest.
 Afterwards defendant sent an excuse for not sending the
R. because it had been previously sold to another.—
 Plaintiff required a peremptory answer, because, if the
F. was lost, it would be to defendant's hurt, and tendered
 the 24 guineas due of the boot, which the defendant
 refused. The *F.* was lost, on another voyage. Plain-
 tiff brought trover for the *R.* and, though it was objec-
 ted, as here, that the property was not transferred, it was
 held that trover lay, every part of the agreement having
 been performed by the plaintiff, and that detinue would
 have lien. In *assumpsit* plaintiff declared, that it was
 agreed, on 1st May, 1792, that he should give defendant
 a colt, in exchange for defendant's mare, and pay him
 two guineas to boot, on 17th December following; that
 it was further agreed, that plaintiff should keep the colt
 till 29th September; that mutual promises were made;
 that defendant, to make the bargain more firm, paid
 plaintiff one half-penny earnest; and that plaintiff kept
 the colt till 29th September, was ready, and offered to
 pay defendant two guineas, but defendant would not

Bach, versus
Owen. 5 T.
Rep. 409.

1793.

receive them, and had not delivered the mare to plaintiff, though often requested. To this declaration there was a demurrer, because it did not appear, that the plaintiff was ready and offered to deliver the colt to the defendant, in exchange for the mare. But it was held, that there was no foundation for this objection: the payment of the half-penny vested the property of the colt in the defendant, and therefore it was unnecessary for plaintiff to shew, that he had tendered the colt to the defendant.

On these principles, I hold, that *David Tate* might have maintained an action for this horse. He might have maintained *detinue, trover, or assumpsit*.

2. Could he have maintained the action of *replevin*?

Co. Lit. 145
—6 *Woods*
Inst. 192, 570.

In *England*, *replevin* lies chiefly, it is said only, for goods taken by way of distress. It seems therefore to suppose a previous actual possession in the plaintiff. Yet, in some cases, it lies, where the plaintiff has not had possession in himself, but in one under whom he claims.

Co. Lit. 145, b.
Bull. Ni. Pri.
53. 2 *Esp.* 48
—9.

Husband may have *replevin*, for goods taken from his wife, before marriage; executor, for goods taken from his testator; lord, for goods taken from his villein, as a distress: the distressing did not alter the property, the goods remained in the custody of the law, and the right devolved to the plaintiffs. In a case in *Modern Reports*, it is stated, without any disapprobation, that *replevin* had been brought by one of the vendees against the other, for sheep sold by the owner to two different persons.—Be this as it may in *England*, the practice in *Pennsylvania* has been to issue *replevins* in all cases where a man claims property detained from him. By this practice, it becomes, in fact, an action of *detinue* or *trover*, with the specific remedy of chancery, unless the defendant claim property; and as it gives a chance of more perfect and summary justice, without danger of abuse, I am inclined to support it in the liberal extent of our practice; and, supporting it, must hold, that *David Tate* might have maintained an action of *replevin* against *George Nixon*, for this horse.

Dall. 156.

3. Can then *Henry Woods* maintain this action?

Let me premise, that *George Nixon* has sold the horse, and parted with all his right in him to *David Tate*, and received for him the agreed price; that *David Tate*

transferred the right of the horse to *Henry Woods*, who thus acquired a right to demand him from *George Nixon*; and that *George Nixon*, in refusing to deliver this horse to *Henry Woods*, acts maliciously and against conscience. He is not, therefore, a man to be favoured in a court of justice, and must expect our leaning to be against him. On the principles of natural justice, independent of any system and established forms, there can be no doubt, that *Henry Woods* ought to recover the horse from *George Nixon*. But if there be any thing in our artificial legal system, and established forms of proceedings, to prevent this recovery, in the present action, we are bound by it: though, if we possibly can, we will lay hold of every thing, to reconcile to our system and proceedings, a recovery, which natural justice so plainly dictates; since the only effect of a contrary decision would be another action, in another form, in which the horse, or his value, would certainly be taken from the defendant, whose conduct has been very unjustifiable.

It is no objection to *Henry Woods's* recovery, that he has but a special property; for *detinue, trover, or replevin*, will lie on a special property. If *Henry Woods* had no right to demand the horse, the defendant might shelter himself under a claim of property in himself or in another. He has none in himself, and *David Tate*, who has, comes forward, and declares, that he transferred his right to *Henry Woods*. The specialty of the property, or the conditions to which it is subject in the hands of *Woods*, is a question only between him and *Tate*, who may do what he will with his own: *Nixon*, who transferred the whole to *Tate*, has no right to call *Tate* to account for the disposal of it. He was but a mere trustee or stake-holder for the true owner; and, in my mind, stands in the same situation, as if he had never owned the horse, but had undertaken to keep him safely for the owner, or had found him. There are many instances, in which, those who had the beneficial interest, though no parties to the contract, from which their right must be derived, have been supported in actions against one of the parties: As on a promise to another to pay money to the plaintiff, or for goods delivered to another for the use of the plaintiff. *Trover*, for goods sold, seems to have been

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Co Lit. 145. b.
5 Bac. abr. 260
3 Bull Ni.
Pri. 53.

5 Bac. 261.
Bull. Ni. Pri.
 35.

Gro. El. 164.
5 Bac. abr. 261
Bull 35. 133
 —4. 1 *Esp.*
 105-6. 2 *Esp.*
 333. *Atkinson*
v Barnes
Lofft. 325.
Green v. Far-
mer.

1793. brought against the seller, by an assignee of the buyer, and the plaintiff recovered. *Trover* was also brought for goods, which plaintiff, having sold to *A*, delivered to defendant, in the name of *A*. to dye for *A*. who, being unable to pay the price, gave up his right of them to the plaintiff, and he recovered against the defendant. An assignee of a *chose in action* cannot sue for it at common law, though he may in chancery. The point cited from the case of *Cummins* assignee of *Linn*, applicable to the present case, is not the point judicially, or at least principally, before the court; and besides, it is decided on the informality of the assignment, a precise form of which had been prescribed by a positive act of assembly, and could not be varied. The question, then, at last, seems to resolve itself into this: Was the transaction between *Tate* and *Woods* an assignment of a *chose in action*, which will not support a suit at common law; or was it a sale or transfer of vested property?

Basset v. Maynard.
(*Palmer's case*) 5 Co.
25 Gro. El.
219, Tel. 188.
5 Bac. 261.
3 Wils. 332.

In an action of *trover* for certain loads of wood, a special verdict was found; that *P.* seised in fee of land, on which there was a great wood, sold to *C.* and his assigns, as many of the trees as would make 600 cords of wood, to be taken at the assignment of *P.*; *C.* assigned his interest to plaintiff. Afterwards *P.* sold to defendant so much of his wood as would make 4000 cords of woods, to be taken at the election of defendant. Afterwards *P.* set out, and plaintiff felled the 600 cords of wood; and defendant (though there was sufficient left for his 4000 cords) took and converted them. On this verdict, it was resolved, that judgment be given for the plaintiff (not only because, though the assignment to plaintiff had been void, yet he having, by the felling, possession of them, and so a good title against a stranger, but,) because *C.* having a right to take the trees, if, after request *P.* did not set them out to him, had an interest, which he might assign over, not a thing in action, or a possibility only, and the interest of *C.* vested in the plaintiff his assignee, in the terms of the contract: for the grantor cannot, by his own act or default, subvert or derogate from his own grant.

This case goes a great way in deciding the case before us. At any rate, it makes me easy in saying, that the plain rules of justice are, in the case before us, con-

sistent with the principles of our legal system. Between the principles laid down in the case cited, and the circumstances of the present case, I see no difference, but that, there, the sale was to C. and his assigns, and here the sale is to *David Tate*. But this difference, I conceive, does not prevent the application of the principles, laid down in that case, to the decision of this. For, as a grant of an estate in fee-simple cannot be restrained by a condition not to alien; so the purchase of a chattel ^{1793.} *z Comm. 338.* implies a power to sell again. The first seller parts with all his power over the thing sold, and cannot restrain the buyer in the use or disposal of his acquired property. If, in the case cited, C. might have taken the trees, if P. on request, refused to set them out, the assignee of C. in whom all his interest was vested, might have taken them. If the assignee of C. might have taken the trees, *Woods*, in this case, might have taken the horse. If he might have taken the horse, he might, after demand and refusal, have brought *detinue* or *trover* for him. And if he might have brought *detinue* or *trover* for him, he may bring *replevin*.

Judgment for the plaintiff for 13l. 10s.

PUMROY RAYNE and wife, v. GUTHRIE and WALLACE.

AN action of debt was brought on a single bill dated 12th November, 1787, for 29l. 10s. payable on demand, for value received.

Ross, for the plaintiff, contended, at the trial, that interest should be computed from the date of the bill;—because, the words “for value received,” were equivalent to money lent, and this bears interest, and because it was commonly understood, that all notes or bills payable on demand, bore interest from the date; and bills and notes were so drawn on this presumption.

This point was reserved, and at December term, 1793, the opinion of the court was delivered.

PRESIDENT. I cannot discover, that it is the common understanding, sanctioned judicially in *Pennsylvania*,

1793. that notes or bills *on demand* bear interest from the date. In the Supreme court, the law, with respect to interest, is stated in the same manner as in *England*. "In the case of promissory notes, where a day certain is fixed for payment, interest is allowed from that day. Where no certain day is fixed, it is payable from demand." It is from judicial, and not indiscriminate, opinions, that we must take the law of *Pennsylvania*. And, without any publicly established rule, to say that a note for a certain sum of money on demand, should, on demand, be a note for that sum and more, seems contrary to the agreement of the parties. The creditor, by a demand, may intitle himself to interest, when he pleases. If parties will not explain their own words, they must leave them to the construction of the law. We must not change fixed rules from mere private opinions. The general rule is, that interest must be paid from the time that the principal ought to have been paid. "For value received," is a mere formal expression, and cannot put this money in the state of money lent.

Jacobs v. Adams. Dall 52. — See also Dall 25, 313. 2 Bla. Rep 6. 3 Wils 205-6. 2 Bro. Cba. 2.

Vesey jr. 17.

NOTE.—Yet interest is recoverable on a settled account from the date of the settlement.

WASHINGTON COUNTY.

September Term, 1793.

STEPHEN PARR v. DAVID JONES.

THE declaration stated, that in consideration of two books and silver spurs sold to *Jones* by *Parr*, *Jones* promised to give to *Parr* a tract of land on *Grave creek flats*, then in the possession of one *Tomlinson*, but the property of *Jones*, and to pay *Parr* for all improvements, which he should make on *Jones's* land; that *Parr* improved four years, made houses, gardens, meadows, fences, &c. and that *Jones* did not furnish the tract of land, nor pay for the improvements made, though requested.

Brackenridge opened the case for the defendant. The *Indians* at the treaty of fort *Stanwix* ceded land to *Pennsylvania*, between the *Ohio*, the *Kanawa*, and *Laurelhill*, within which they had previously granted large tracts to several persons, as to *George Croghan*, and to the *Indiana* company, to recompence certain damage done to their property, or to *Baynton*, *Wharton*, and *Morgan*, the principal sufferers, for the use of themselves and the others. This grant not being efficient till confirmed by the crown, they went to *England*, to have it confirmed; but the war breaking out, nothing was accomplished. In 1772, *Jones* had been employed by the *Indiana* company, as an enterprising man, and a clergyman, to endeavour to form a settlement on their lands, and for this service he was to have an equivalent. One *Davis*, a young clergyman, came with *Jones* for this purpose; but dying by the way, he left it in charge on *Jones*, to provide for *Parr*, his brother in law, (whom *Jones* had never seen) a settlement in the *Indiana* grant, with himself and other settlers. *Margaret Davis*, sister and executrix of *Davis*, the clergyman, gave *Jones*, as a memorial of her brother's respect for him, *Doddridge's* translation of the *New-Testament*, in two volumes, and a pair of silver plated spurs. 1793.

It was proved, that in 1772, *Jones*, having laid out lots of 320 acres each, for the settlers, and, among the rest, one to *Parr*, *Tomlinson* opposed the settlement.—Whereupon *Jones* told *Parr*, that, till he could get possession of his own lot, he might occupy and improve a tract of land, which *Jones* had, and now holds, under another right since acquired, by patent from the state of *Virginia*. *Parr* went on this land, built a small stable, and cleared about seven acres, of which one and a half was meadow ground. *Jones* was to pay *Parr* for the improvements he made, but the cleared land was never measured, nor any demand made of the compensation — *Parr* knew the situation in which *Jones* acted, and the state of the title to the land, to be as stated by Mr. *Brackenridge*. There was evidence, that the books and spurs were given as a present; and, though this was slightly impeached, yet no evidence was given, that they were a consideration for selling or procuring a tract of land.

PRESIDENT. There are two promises laid in the declaration :

1793.

1. To furnish *Parr* with a tract of land on *Grave-creek* ;

2. To pay for improvements on *Jones's* tract, on which *Parr*, till he could get possession of his own, was permitted or desired to settle. For a breach of either or both of these promises, and of these only, damages may be given.

It appears, *Parr* understood the views and authority of *Jones*, and there is no appearance of deception. *Parr* knew the title under which *Jones* promised him the land, and knew, that, if that title failed, *Jones* had no other.—*Jones* was but an agent. The consideration which he received from his employers, makes him answerable to them for his conduct, but does not make him liable to others as a principal.

1. Shall *Parr* have damages then, for not getting a title to the land? Not from *Jones*, for he was but an agent ; nor from any body, for the title has failed, from a cause within the view of all the parties, and there is no absolute warranty.

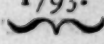
2. Shall he have *Jones's* tract ? It was not in the view of *Parr* to have this. If it had been, before he could receive *Jones's* tract, or damages instead of it, he must pay the purchase money ; and *Jones* offers it on a reasonable compensation.

3. Shall he have the value of his labour ? He ought first to have ascertained the quantity of land which he cleared, and have given notice of it to *Jones*, and demanded the price.

By consent there was a verdict for 7*l.* without costs.

PENNSYLVANIA v. JOHN HUFFMAN.

HUFFMAN was indicted at *June* sessions, 1793, for that he, on the 4th *April*, 1793, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain receipt, purporting to be signed by *Robert Lucky* (then deceased) in his lifetime, with the name of the said *Robert Lucky*, the tenor of which receipt is as follows, (to wit)

" *January 4th 1793 Than Received of John Huffman fifty bushels of wheat for the use of Hugh Brisson I say Received by me* 1793. 

" *Robert Lucky.*"

with intent to defraud the representatives of the estate of the aforesaid *Robert Lucky*, deceased, and with intent to defraud the aforesaid *Hugh Brisson* of the value of the said fifty bushels of wheat.

It appeared in evidence, that *Lucky* was owner of a mill, and was indebted to *Huffman* on a judgment, that his land was encumbered by prior judgments, and that he died insolvent. This receipt appeared as given for wheat put into *Lucky's* mill, and, after the death of *Lucky*, was delivered to *Brisson* by *Huffman*, as payment for wheat, which *Huffman* owed to *Brisson*. The receipt was written by *Huffman*, and he being a German, and writing *p* for *b*, was expressed as for fifty *pushels* of wheat for the use of *Hugh Brisson*. The signature was proved not to be the hand writing of *Lucky*, and he, at the date, was sick, and did not attend the mill, and no wheat was then delivered by *Huffman*.

Ross, for the defendant. You cannot find *Huffman* guilty on this indictment—1. Because there is a variance between the receipt stated in the indictment, and the receipt produced in evidence. The receipt in the indictment is for the use of *Hugh Brisson*. The receipt produced in evidence is for the use of *Hugh Brisson*.

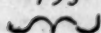
2. This indictment lays the offence to be against the act of assembly. It is not one of the offences stated in the acts of assembly. 1 St. L. 5, 64

3. The evidence is not sufficient to convict. *Huffman* had a bond and judgment on *Lucky*, and, from prior incumbrances, had no other method of getting his money, but by obtaining this receipt from *Lucky*. *Huffman* never pretended that he had delivered wheat.

PRESIDENT. You may read the receipt, as the defendant intended it, as for fifty bushels of wheat for the use of *Hugh Brisson*, and find a general verdict of conviction. But if you are not satisfied with this, you may find a special verdict.

The jury found him guilty of forging a receipt for fifty *pushels* of wheat, for the use of *Hugh Brisson*, and putting the name of *Robert Lucky* to it.

1793.



Ross moved in arrest of judgment, on the variance between the indictment and the verdict.

Bradford, for the state, being asked by the court whether he had any hope of being able to support this verdict, said, he thought he could, and would look into it.

He afterwards gave it up, and desired that the defendant should be bound over to answer to another indictment.

At June sessions, 1794, *Huffman* was tried again, on another indictment, drawn up in the same words as the former, except that this one stated the receipt for the use of *Hugh Prison*.

To this indictment he pleaded a former conviction.

Ross, for defendant, on this plea, read and relied on 2 *Hale's P. C.* 244-8.

2 *Hale* 244-5. PRESIDENT. The cases cited by Mr. *Ross*, are cases of acquittal on the merits, where the difference in the two indictments is chiefly circumstantial. Perhaps the same reasons which would preserve a presumed innocent man from a second trial, would not preserve a presumed guilty man. On the merits, *Huffman* has been convicted of a forgery, though not of the forgery stated in the indictment on which he was tried. On the former indictment and verdict, no judgment could be given, because the verdict did not find the offence laid in the indictment; and because that indictment for forging the note stated in it, could be no bar to another indictment, for forging the note given in evidence.—The error is apparent on the record. And to say now, that this is an indictment for the same offence, would be, in fact, saying, that we ought to have given judgment on the former indictment. To let *Huffman* escape now, by saying, that *Brisson* and *Prison* are the same, would be contradictory to the principle, on which he formerly escaped, that they are different. I should have thought this case the same, if, instead of a special verdict, there had been an acquittal, on account of the variance. For I go upon the principle, that the former indictment, stating a different offence from that stated in the present, is no bar to proceeding on this indictment. This plea therefore cannot avail the defendant.

On the trial of the general issue, the evidence was to the same effect as before; and the jury found a general verdict of conviction.

Vaux's case,

4 Co. 44.

2 *Hawk.* 536

—7.

Cogan's case,

Leach, Crown

Law 389.

Rofs, for the defendant, (who was a wealthy man) moved in arrest of judgment;—1. Because the indictment is laid as a felonious forgery, and against the act of assembly, when it is not a felony under any act of assembly; and, 1793.

2. Because it is laid to defraud *Hugh Prison*, when there is no such man, and the representatives of the estate of *Robert Lucky*, when it ought to have been the representatives of *Robert Lucky*. —6.

2 *Hawk*. 320.

Bradford, for the state, read *Henry Lavel's* case.

Leach's Crs

Law 239.

ib. 77.

Mr. *Rofs* was very importunate that no opinion should be given, till he should have an opportunity of arguing this case again, which, on account of his absence, was not till *March* sessions, 1795, when he rested on the same points as before, and cited *Westbeer's* case. He also moved for the remission of the defendant's recognizance, forfeited for absence. This was granted on the terms of his paying reasonable costs to the witnesses at both trials. Sentence was then passed in the terms of the act of assembly of 1705, against counterfeiting hands and seals. *Leach's Crs.*
Law 13.
St. L. 64.

PENNSYLVANIA v. ANDREW SULLIVAN.

THIS was an indictment for a rape on *Sarah Sutherland*, on 19th *June*, 1793.

Rofs, for the prisoner, suggested that both penetration and emission must be proved; though he admitted, that this opinion had been doubted by lord *Hale*. He urged also the incredibility of the testimony. 12 *Co.* 36-7.
1 *Hawk.* 169.
1 *Hale* P. C. 628.

PRESIDENT. *Emissio seminis* of itself makes not rape without actual penetration, but it is said that, as evidence of penetration, it is proper evidence on a trial for a rape. The essence of the crime is not the begetting a child, which cannot be done without emission; but the violence done to the person and feelings of the woman, which is completed by penetration, without emission. We are therefore inclined to be of lord *Hale's* opinion, that the crime is sufficiently proved, when penetration is proved. If, together with penetration, *Hale* 628.
Woods' Infl. 370.

1793. emission must be proved, may not the ravisher prevent
 proof of his crime by onanism? Or is it to be expected,
 that the woman, especially agitated by such outrage,
 should be able to give explicit proof of this circumstance,
 The jury found him not guilty.

Gen. xxxviii.
 9.

PENNSYLVANIA v. ANDREW SULLIVAN.

vid. 1 Hale
 559. 560. 2
 Hawk. 624-5
 Kel. 30. 52.
 2 Hale 245-6

TOGETHER with the indictment for a rape, another indictment was preferred and found for a burglary, on 19th June, 1793, in breaking and entering the house of *Alexander Sutherland*, and committing a rape on *Sarah Sutherland*. The rape laid here as committed, is the same of which the prisoner had been just before acquitted; and there was no count laying the burglary as breaking and entering with intent to commit a rape; Mr. *Bradford*, however, agreed with Mr. *Ross*, that this case should be tried by the same jury, which tried the preceding; and the prisoner was acquitted.

JACOB NESSLY v. ANDREW SWEARINGEN.

THIS was an action of covenant on articles to convey land.

Swearingen had purchased 500 acres of land from *David Shepherd*, and sold it to *Nessly*, who had also purchased from *Shepherd* 900 acres of land, adjoining the first. *Shepherd* conveyed 1000 acres to *Nessly*, telling him that 500 of these were on *Swearingen's* account.—*Shepherd* had not title to more than 1000 acres. *David Shepherd* being produced as a witness, was objected to, as interested.

PRESIDENT. If the plaintiff succeed, the defendant will sue *Shepherd*, on his contract to convey to him. If the defendant succeed, the plaintiff will sue *Shepherd*, on his contract to convey to him. Thus being equally bound to both, he stands as indifferent between them, as if bound to neither, and is a competent witness.

The opinion of the court was delivered to the jury in favour of the defendant; and the plaintiff then suffered a nonsuit.

JAMES HILL v. NATHANIEL WALLACE.

ON an appeal from the judgment of a justice of the peace, *Hill*, the plaintiff, declared in *assumpsit*, for 3*l.* 16*s.* for goods, wares, and merchandizes sold. The evidence was of wheat delivered into the mill of *Wallace*, the defendant, generally, without stating any particular purpose.

1793.

Bradford and *Purviance*, for the defendant. The justice was right in giving judgment against *Hill*, even though the wheat had been received and misapplied by *Wallace*: for only *trover* will lie in this case, and a justice has no cognizance of *trover*. This is no sale, nor delivery for the use of the defendant, but a delivery for the use of *Hill*. Therefore, *trover* is the only proper action. *Assumpsit* is not maintainable, and there ought to be a nonsuit. 1 St. L. 309.

Ross, for the defendant. The delivery of the wheat is clearly proved, and will support *assumpsit*, an action rather to be favoured than *trover*. 3 Comm. 161
F3.
Corup. 290 4,
377.

PRESIDENT. We do not think ourselves at liberty to direct a nonsuit; for we cannot say, that it is *impossible* for the jury to presume a sale.

There are two questions:—

1. On the merits, whether the wheat was delivered.
2. On the form of the action, whether the evidence supports it.

1. The first question we leave to your determination.
2. On the second, it has been contended, that no action will lie, but *trover*. There is no foundation for this opinion. Were this true, and the wheat were lost or stolen, from the grossest negligence, its owner would have no remedy; for, in such case, there would be no conversion, and, without conversion, *trover* could not be supported. It is clear, that *assumpsit* will lie.

But the true dispute in this case has not been touched on. The real dispute is not whether *trover* or *assumpsit* lies; but whether this ought to be a special *assumpsit* instead of a general *indebitatus assumpsit*, as it is.

If from the circumstances of this case, and the course of this trade in this country, you can presume a sale, this action will lie.

The jury found for the plaintiff 2*l.* 5*s.* 6*d.* damages.

ALLEGHENY COUNTY,

December Term, 1793.

DAVID IRWIN v. JOHN RANKIN.

1793.

THIS was an action on the case, for selling a horse for 20*l*. assuming that he was sound, when, in fact, he was unsound, and of that unsoundness died.

It was proved, that *Rankin*, in selling the horse, said, he had been overheated, and was foundered; but that he would warrant him sound in other respects. The horse, after being worked sometime, died two weeks after the sale; and there were opinions, that he had been affected, for some time before the sale, with the disease of which he died.

Bradford, for the defendant, argued, that there was no fraud in the contract, that the sale was fair, and that the death of the horse was owing to his having been over-worked.

PRESIDENT. This action goes not on the foundation of fraud. The evidence proves none. And your verdict, going no farther than the *allegata* and *probata*, the facts alledged in the declaration and proved by testimony, cannot establish against the defendant any charge of fraud, nor acquit him of it. Your verdict must go on another point entirely, the undertaking that the horse was sound. The question then is, what was the state of the horse, at the time of the sale. If he was only overheated or foundered, and the subsequent death was the effect of being worked after over-heating and foundering; *Irwin* must bear the loss: for *Rankin* sold him as an over-heated, and a foundered horse. If, on the contrary, the horse was, at the time of the sale, unsound of a disease, of which he afterwards died; *Rankin* must bear the loss; allowing for the profit, if any, made of the labour of the horse subsequent to the sale.

When the jury returned, and were ready to give a verdict, the plaintiff suffered a nonsuit.

PENNSYLVANIA v. JAMES HONEYMAN.

HONEYMAN was indicted for the murder of 1793.
Benjamin Askins, on 23d November, 1793.—
Askins, *Honeyman*, and two others, *Ward* and *Faris*,
 had been drinking together, and were dancing in *Askin's*
 house. *Ward* shoved *Faris*, who complained of it.—
Ward asked if he resented it. *Askins* said, if he did
 not, he would; and he threw off his cloaths, and struck
 at *Ward*, who kept off the blow, and left the house.
Honeyman called after him to come back, and see it out,
 and he would see fair play. *Ward* would not. *Honey-*
man turned to *Askins*, said, "You are a damned rascal,
 to strike a man before he is ready," knocked him down,
 stamped on him, and beat him. Two or three times,
 as *Askins* raised himself to his knee, *Honeyman* knocked
 him down, telling him, "*Ben*, if you know when you
 are well, lie still." *Askins* died the next day of the
 bruises. He was a puny weak man; *Honeyman* was a
 stout young fellow.

Brackenridge and *Carson*, for the defendant. Fight- 1 L. Roy. 143.
 ing on a sudden quarrel, and killing, is only man- 4 Comm. 191.
 slaughter. We admit, this is manslaughter. Though
 implied malice be sufficient to make the killing murder,
 still there must be malice. If there be no circumstances
 of malignity, or, if the killing be sudden, or with a *Foster* 255,
 weapon not likely to kill, there is no ground for imply- 250.
 ing malice. Here there is no deliberate design. The
 parties were in liquor. *Askins* and *Honeyman* were in
 terms of friendship. *Askins* violated the peace in his
 own house. *Honeyman* wanted to repress him, and what 12 Co. 33.
 he did was in defence of his friend.

Galbraith, for the state, contended, that from the
 evidence, and the law arising out of it, the killing was
 murder.

PRESIDENT. The unfortunate ground of this crime,
 is that riotous intemperance, so dangerous, on all occa-
 sions, especially in ungarded and unprincipled company.

This is not justifiable homicide, not having happened
 in the discharge of any duty; nor is it excusable, not
 having happened in self-defence, or by accident. It

1793.



must, therefore, be felonious homicide: and the question is whether it is murder or manslaughter.

1 Hawk. 124.

Prima facie, every killing is murder, for malice is presumed, unless the prisoner shew extenuating circumstances, which take away the presumption of malice. If there be no malice, it is but manslaughter. If there be express malice, or malice implied in the circumstances of the transaction, it is murder. The distinction between murder and manslaughter is nice; and cases lying on the borders of both have been often, and long and earnestly disputed, and doubtfully decided. Hence so many special verdicts, to find whether manslaughter or murder.

Hugget's case,

L. Ray, 143.

Kel 59.

Thomson's ca.

Kel 66.

See Kel. 119.

136. L. Ray,

1485.

Foster 313,

25, 26, 1.

L. Ray, 1488

-9, 1, 93.

Kel. 112, 115.

I have said, that every voluntary killing, or every act, which apparently must do harm, which is done with intent to do harm, and done without provocation, and of which death is the consequence, is murder; for provocation is not presumed, and malice is presumed: the law implies malice, and the defendant must shew provocation, to rebut the presumption of malice. But malice may be more than implied; it may be express.

L. Ray, 1489.

Kel. 127.

Malice express is a deliberate or formed design of taking away the life of another, or of doing him some bodily mischief: and this may be manifested either by words or actions. Implied malice is collected either from the manner of the killing, or from the person killed, or the person killing. In wilful poisoning, in killing, though undesignedly, by a voluntary act, apparently mischievous, or in killing without provocation, malice is implied from the manner of the act: and it is not necessary, that the malice should have existed long before, it is sufficient, if it exist at the time.—

L. Ray, 1488.

1493. 1 Hawk

ch. 31, § 32.

41, 46 47 9.

1 Hale 471.

Foster 259.

L. Ray 1437.

Kel. 126-7.

Malice, as used in the definition of murder, is a technical expression, and not to be taken in the common sense of that word. In common acceptation, malice is taken to be a settled anger in one person against another, and a desire of revenge. But in this legal or technical acceptance, it imports a wickedness, which includes a circumstance attending an act, that cuts off all excuse.

It is used as synonymous to frowardness of mind; and means, that the fact hath been attended with such circumstances, as are the ordinary symptoms of a wicked, depraved, malignant spirit, the plain indications of a

25 H 8 c. 33.

Foster 25 7.

Kel. 127.

heart regardless of social duty, and fatally bent upon mischief. It is a design of doing mischief, a voluntary cruel act. Malice, therefore, is implied in every act of killing, for which there is no legal justification, excuse, or extenuation. 1793.

The excuse for murder arises from authority not wantonly or cruelly exercised or abused, or from the infirmity of the human constitution. A father may correct his child, or a master his servant, apprentice, or scholar, in a reasonable manner; and if an accidental death ensue, it is only manslaughter, or perhaps homicide *per infortunium*. But if the correction be unreasonable, with unusual or improper weapons, or with extraordinary circumstances of cruelty; and if death be the consequence of it; such killing is murder. Such would be the case of a killing, by any person, in the preservation of the peace. If one, having no authority over another, but provoked to passion by an act of personal violence, in his passion, beat the person thus violently provoking him, and, by such beating, kill him, it is but manslaughter: passion excludes the presumption of malice. But if the provocation was not sufficient, or whatever it might have been, if there was no passion excited, or, though excited, if there was time for the passion to cool, and it had subsided; the killing is murder. Cool expressions, wanton, and deliberate or unusual cruelty, are evidences of want of passion, and are therefore evidences of malice. Suddenly interfering, in favour of a friend engaged in combat with another, and killing the other in defence of this friend, has been held but manslaughter. This must be on the supposition of passion excited by the danger of the person, in whose favour the killer interferes in the quarrel. Kel. 28, 64, 65, 127 132-3 Foster 262. L. Ray. 144, 1498. 1 Hale 473 4. 4 Com. Di. 20.

The jury are the judges whether the facts be true or not; the court must judge of what description the crime is, which those facts compose, whether murder, manslaughter, or inferior homicide: for that is defining or explaining what the law is; and this is the duty of the court. Kel. 60, 61, 63, 133, 119, 138. 1 Hawk. c. 31. § 23. 38, 39 L. Ray. 1495.

It becomes our duty, therefore, to say, on the supposition, that the facts stated, and not contradicted here, were what really happened, whether they amount to manslaughter only, or to murder. This depends on

1793.

whether *Honeyman* acted with malice aforethought, in its legal sense. And this depends on whether he acted on sufficient provocation and in passion.

Foster 313.

He had no provocation. The provocation was to *Ward*. There was no occasion to interfere in favour of *Ward*; for he had left the house, and was out of the reach of danger, if he had ever been in any, from *Askins*. *Askins* was preserving (however improperly) the peace of his own house. *Honeyman* had no right to interfere; and we see no interest that he had in *Ward* more than in *Askins*, nor any motive, but the love of mischief. If even there had been provocation, (and there was none) *Honeyman* appears to have been cool, and without passion. As he knocks down *Askins*, he says, "If you know when you are well, *Ben*, lie still." His acts are voluntary, wanton, deliberate, and cruel, to a poor weak man; they are the symptoms of a froward mind, of a wicked, depraved, and malignant spirit; the plain indications of a heart regardless of social duty, and fatally bent upon mischief: they therefore manifest malice aforethought; and this killing is murder.

The jury found him guilty of murder: and sentence of death was passed on him. An application was made for a pardon—and, on a reference to the attorney general, he suggested, as an error in the indictment, that the epithets, *feloniously*, *wilfully*, &c. applied to the assault, were not also applied to the stroke.* On this a writ of error was brought. What the issue of this was, or whether *Honeyman* was pardoned, I know not.†

* See *Walker's case*, 4 Co. 41-2.

† See 2 *Dall. Rep.* 228, where the judgment in this case is reversed.

JOHN CHAMBERS & DAVID BOYD, v. JOHN CRAWFORD and JOSEPH BARKER.

CHAMBERS and Boyd employed Crawford and Barker, boat-builders, to build for them a *Kentucky* boat, for conveying them and their families down the *Ohio*. The boat was built, delivered, and loaded; but

had not proceeded many miles, till she took in water, and continuing to do so, sunk about a mile below the mouth of *Turtle-creek*, in the *Monongahela*. The goods aboard, worth upwards of 100*l.* were lost. The plaintiffs paid the defendants 14*l.* for the boat, being about a dollar *per* foot in length. They brought *assumpsit* on an undertaking to build a sufficient *Kentucky* boat, averring it insufficient, and thereby lost with the goods.

1793.

Ross, for defendants. One not a workman is not liable for insufficient work, without an express promise. A workman is, without a promise. The defendants are workmen, and liable without a promise. But to what? Only to damage for time lost in getting a better boat. The employer ought not to accept the boat, and then, after a loss, come on the workmen for insufficient workmanship. The employer ought to examine the work at the time, and then either accept or reject it conclusively; and he is bound by his acceptance; and cannot afterwards say, that the work is bad. The loss that has happened is, in a great measure, owing to their own carelessness, in tying the boat insufficiently to the shore.

Brackenridge, argued for the plaintiffs, and drew a lively picture of their damage and distress.

PRESIDENT. If a workman does work insufficiently, he is answerable for all consequences arising from this insufficiency, notwithstanding an acceptance by the employer, without objections; for the employer is not to be presumed acquainted with the execution of the work, and the workman must be. If the loss, in this case, happened through such carelessness or accident, as, in the case of a sufficient boat, would have produced the same effect, you will find for the defendants. But if the loss happened through the insufficiency of the boat, measuring that insufficiency by the expressed intention of the parties, and the usage of the trade, you will find for the plaintiffs, with damages adequate to their loss.

The jury found for the plaintiffs 62*l.* 10*s.*

WESTMORELAND COUNTY.

December Term, 1793.

THOMAS HORSEFIELD v. CRAFT COST.

1793.

TO an action of *trover*, for a *United States* certificate of 4*l.* payable to bearer, brought to *March* term, 1793, and laying the conversion on 1st *October*, 1792, the defendant pleaded the general issue, and the statute of limitations.

In a suit before a justice of the peace, in *September*, 1785, judgment had been given against *Horsefield*, for 3*l.* 5*s.* 10*d.* *Cost* became security for this debt, and *Horsefield* having left the country, the justice, about a year after the judgment, at the desire of *Cost*, who had this certificate of *Horsefield* in his hand, issued an execution, on which *Cost* gave up the certificate to the constable, for sale, who after the usual notice, sold it to *Cost* for 5*l.* The sale was open and fair, and the price supposed reasonable. No demand of the certificate was made of *Cost* till *January*, 1793, when demand was made by *Horsefield's* attorney. *Cost* refused to give it, saying he bought it at constable's sale, and that *Horsefield* was yet in his debt. Together with the demand, an offer was also made to pay *Cost* the debt due him by *Horsefield*.

Ross, for the defendant. The material points in *trover* are property and conversion. This certificate was left for safe custody. A pawn cannot be sold by the private authority of the pledgee; but if he sue, he may take the pawn in execution, and sell it by authority of law. The sale by the constable, and the purchase made by *Cost*, a public and notorious act, was clearly a conversion, and the statute of limitations, running from that, bars this action.

1 *Bac.* 237-8.2 *Esp.* 359.

Brackenridge, for the plaintiff. The property of goods pawned is not altered, but remains in the pawnor, to be redeemed at any time. The statute of limitations does not prevent our recovery. The cause of action accrues only from demand and refusal. No suit could have been

brought without such demand and refusal. The sale is the act of *Cost*, and wholly of his contrivance. You ought to give in damages the value of the certificate at the time of the demand, that is 41*l.* with interest.

1793.

PRESIDENT. There are three questions:—1. Whether there be property in plaintiff?—2. Whether there be a conversion by defendant? and,—3. When this conversion was? On these a fourth question may arise,—What damages ought to be recovered?

There can be no doubt, that a certificate, the property of the plaintiff has been converted to the use of the defendant. But if the defendant has done this in a legal manner, the plaintiff is bound by it. For, to support *trover*, there must be a wrongful conversion.

If this property had been such as might be taken in execution, as a horse or other chattle, clearly *Cost* had a right to give it up to satisfy the execution for the satisfaction of which he was security, and to save himself; and the purchase at the constable's sale would have been legal, and the conversion justifiable. It would be strange if the surety must give up his own goods, when he can give goods of the debtor. And though there be ground to doubt, whether this certificate could be *taken* in execution, there can be no doubt, that it might be *given* in execution. Being payable to bearer, it is transferable by delivery without assignment; and its real value being depreciated below the value apparent on the face of it; it seems to have been a proper article to bring to market to ascertain its value. Why then, might not *Cost*, left with the custody of this certificate, and burdened with the payment of this debt, have *given* this certificate in execution for this debt, in the same manner, as *Horsefield* himself might have done?

*Francis v.
Nash. Ca.
temp. L.
Hardw.
B. R. 53.*

But, without saying any thing certainly on this point, we must, on the third question, at what time the conversion was made, clearly decide this case, in favour of the defendant, on his plea of the statute of limitations. Demand and refusal is not a conversion, it is but evidence of a conversion, of which there may be other evidence. Though demand and refusal be frequently the only evidence that can be given of conversion, yet, if conversion can be proved, without proving demand and refusal, they need not be proved. The conversion

*1 St. L. 95.
10 Co. 56-7.*

1793.

here was at the time of the sale. Since that time, the plaintiff has suffered more than six years to elapse, without bringing an action; and this action now brought, after six years, is therefore barred by the statute of limitations; and you must find for the defendant.

The jury found for the defendant accordingly.

WASHINGTON COUNTY,

December Term, 1793.

JAMES BUCHANAN v. HENRY TAYLOR.

THIS was an action on the case against a justice of the peace, for wilfully and oppressively issuing an execution against the goods of the plaintiff, *Buchanan*, on a judgment given against him by the defendant, the justice, at the suit of *Peter Peterson*, for 3*l.* 18*s.* when the said judgment was satisfied, of which the defendant had notice.

Peterson had put into the hands of *Taylor* sundry notes or claims for money due, and, among the rest one against *Buchanan*, on which this judgment was given. *Peterson* being in want of money, applied to one *Fink*, who lent him a certain sum, on *Taylor* becoming surety, which he did on condition, that he should be at liberty to apply the money due on the judgments before him, when it came into his hands, to the payment of the money borrowed from *Fink*. *Peterson* agreed to this. *Buchanan* was present, and told *Fink*, that, *as to the money due by him, it was a just debt, and he need not fear its being paid.*

Fink demanding payment of the money lent, an execution was issued against *Buchanan*, who, having some other dealings with *Peterson*, went to him and procured from him a receipt for 3*l.* 18*s.* to be set up against the judgment confessed by him before *Taylor*, to which *Buchanan* said *Taylor* would agree. This receipt was shewn to *Taylor*, and he was desired to allow it in the execu-

tion. But he refused, because the money had been appropriated to satisfy the debt due to *Fink*, and that debt was not yet satisfied. The execution was proceeded in; and a horse of *Buchanan's* was sold for 5*l.* to a friend of his, who sold him back to *Buchanan* for 12*l.* On this the claim of damages was founded, and they were laid at 20*l.* The money made on the execution was paid over to *Fink*. Notice of this suit had been given to the justice, according to the act for rendering justices of the peace more safe in the execution of their office, &c. 1793.

Ross, argued for the defendant, that *Peterfon* having assigned the money due on this judgment, to a certain purpose, had no further control over it; and that a justice was only answerable for corruption, oppression, partiality, or malice: none of which existed here; for the conduct of the justice was fair and honest. 1 Burr. 561. 4.
2 Burr. 719.
-22.

Bradford, for the plaintiff. *Peterfon* remained in the character of plaintiff before the justice, and had control over the judgment. The justice was judging in his own cause.

PRESIDENT. An assignment, though not in all the forms of law, vests the equitable interest in the assignee; and the assignor will not, afterwards, be permitted to exercise any authority over the property assigned. It is indifferent whether the equitable assignment be in writing, by parole, or by the mere delivery of the muniments or evidences of right. If a debtor, who has paid a bond, stands by, and sees it assigned for a valuable consideration, and, concealing his payment, declares the debt just, he shall pay it again to the assignee. After the appropriation by *Peterfon* of his debt on *Buchanan*, *Peterfon* had no longer any authority over it, till the object of this appropriation was satisfied. *Fink* is the real assignee, for he had an interest in having the money, in the first instance from *Buchanan*, and not being turned round to *Taylor*. *Fink's* security was not to be lessened by any after act of *Peterfon's*. *Taylor* was but an organ. His interest arose from the request of *Peterfon*, and to favour him. *Buchanan* had assented to this appropriation of the money. Nothing worse than indelicacy can be imputed to *Taylor*. His conduct is fair, and for an honest purpose: the fraud is in *Buchanan*.—At all events, the declaration is not for acting as a

Dallas 139.
1 T. Rep. 22,
619. 4 T. Rep.
248 340.
24, 83. 40.
3 T. Rep. 681.
2 Bla. Rep.
1147, 1269.

1793.

judge, in his own cause, but for wilfully and oppressively issuing an execution for a debt satisfied. The debt was not satisfied, for it was due to *Fink*; and there is no oppression, but an honest administration of justice.

The jury found for the defendant.

PENNSYLVANIA v. JOHN BELL.

JOHN BELL was indicted for the murder of *James Chalfant*, by striking him with a stake on the head.

The prisoner and the deceased, with several others, were at a *husking frolick*, at the house of a neighbour, on the day laid in the indictment; and, as usual in such cases, drank freely. *Chalfant*, who was a joking, and, when he drank, a talkative man, frequently excited laughter at *Bell*, who was a man of weak mind, by alluding to some previous transaction, the pulling of the cape off *Bell's* coat, in helping him on, or, as *Bell* thought, pulling him off a horse when he was drunk. As often as *Chalfant* mentioned the cape of *Bell's* coat, *Bell* became, as it were, mad with passion, wanted *Chalfant* to fight with him, provoked him to do so, "or clear him of the law." *Chalfant*, who was a great deal stouter than *Bell*, seemed to have no disposition to fight, but only to make sport; and by his declining to fight, and by the interference of the company, *Bell's* passion subsided, and his good humour was restored, till again provoked by *Chalfant's* mentioning the cape of his coat.— After supper, while a woman of the company was singing a song, *Chalfant* said, that was just like *Bell's* coat. *Bell* flew into a passion, came to *Chalfant*, took him by the hand, said, "Damn you, if you be a man, come out and fight me;" and seemed to draw him up from his seat. As *Chalfant* rose to go out with *Bell*, a woman who had been sitting on his knee, said, "You are not going to strike *Bell* surely." "No," said he, "I would not for fifty pounds." As they came near the door, *Bell* stepped out hastily before *Chalfant*, and, as *Chalfant* bent his head going out of the door, his head

and one foot being outside, and one foot yet within, *Bell* struck him with a stake on his head. *Chalfant* fell. *Bell* dropped the stake and run off. They called after him, to come back, he had killed the man, he answered, "No, damn him, he is not dead yet, and if he be, he cleared me of the law; and I will give as much to any man, who takes his part." *Bell* was pursued, but he escaped and absconded. He was apprehended some time after. The stake had been taken from a small pen in the yard. *Bell* some time before he called out *Chalfant*, had gone out to make water, and was near the place, whence the stake was taken. But, before and after that, they seemed to be on good terms, and *Bell* did not become angry again, till *Chalfant* again mentioned the cape of his coat. The stake was produced at the trial, a stout elm stick, likely to kill. *Chalfant's* scull was broken, and he died soon after. There was evidence given, that, several months before, in consequence of a former provocation, *Bell* had said, that he would knock down *Chalfant* with the first thing he laid his hands upon. But there was also evidence of a reconciliation. At the time the blow was given, an axe and a hoe were lying in the yard.

1793.

Bradford, for the Commonwealth, read the definitions of murder and of malice, and stated that the testimony amounted to murder. 4 Comm 194 6
Foster 256.

Brackenridge and *Ross*, argued for the defendant. This is not murder: but, we admit, it is manslaughter. The criterion is whether the killing has proceeded from a heart regardless of social duty, and fatally bent upon mischief. The boundaries between murder and manslaughter are scarce conceivable, and the distinction, according to circumstances, is nice; and judges differ in opinion on the same circumstances. Murder is a deliberate premeditated killing. Manslaughter is a sudden killing, on provocation. There are many cases, in which it has been solemnly determined, that killing on provocation, not greater than the provocation in this case, amounts only to manslaughter. In the case of *Sted-* Foster 255-7.
man, a soldier, who had given the first provocation, and killed a woman, as she fled from him, by stabbing her in the back with his sword, it was held clearly to be no more than manslaughter. In the case of *Reason* and Foster 292.
1 Str. 499.

1793. *Franter*, for killing a man, by both falling on him, and stabbing him in nine places, while he lay on the ground, begging for mercy, and unable to resist them; it was held and found to be but manslaughter, though the jury was disposed to hang them for the barbarity of the fact. In the case of *Taylor*, a soldier, for killing a man, by stabbing him with his sword; though *Taylor* had previously used words, which signified a disregard of social duty, and a disposition to kill, yet, by reason of the provocation, it was held to be but manslaughter.—
- 5 Burr. 2793. While several persons were playing at bowls, two of them fell out, and quarrelled the one with another; and a third man of them, who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died. This was held but manslaughter, because it happened on a sudden motion, in revenge of his friend. Two boys fighting together, one of them was scratched in the face, and run three quarters of a mile to his father, who went three quarters of a mile to where the other boy was, and killed him with a blow on the head. Yet, though this blow was given with a cudgel, to a boy, by a man, after going three quarters of a mile, and the provocation was not to himself, nor in his presence; on account of the provocation, it was held but manslaughter. If one jostle another, or whip the horse of another, and the other, on this provocation, kill him, it is but manslaughter. If a man, using provoking words to another, receives a blow from this other, and returns it, and is then killed by the other, it is but manslaughter. So if a man, provoked by insulting words, does not attack the insulter, till he has put himself on his guard, and then, in fighting with him, kill him, it is but manslaughter. In the case of *Oneby*, there was express malice. Here there is none. You will not presume it, from any thing that happened before. If two men, who have formerly fought on malice, are afterwards reconciled, and fight again, on a fresh quarrel, it will not be presumed, that they were moved by the old grudge, unless it appear by the whole circumstances of the fact.
- 1 Hawk. 124.
—5.
Foster, 295.
2 Str. 766.
1 Hawk. 124.
1 Hale 452.

We admit, that, if *Bell* had previously prepared this stake or cudgel, to beat *Chalfant*, as has been suggested, this case would have been murder. But this is not proved, and you will not presume it. When *Bell* went out, at the

time when it is suggested that he took the stake from the fence, he was reconciled to *Chalfant*. He did not, as, 1793.
 if he had retained malice, and provided the stake for an evil purpose, he would have done, quarrel with *Chalfant*, immediately after he came in; but continued at peace with him, till *Chalfant* again provoked him. Where was the use of providing a stake, when an axe, a hoe, &c. were lying at the door? The stake was not prepared before-hand, but suddenly offering itself to him, in the fury of his mind, he seized it, as a weapon, with which to combat against superior strength, and, in rage, not malice, with it killed *Chalfant*. Even in verdicts, courts 2 Str. 1015.
 will not supply a want of finding by the jury; much less will juries, by presumption, supply a want of evidence. All your presumptions will be in favour of innocence. If, on special verdicts, when it has been doubted, Kel. 59-62.
 whether the facts amounted to murder or to manslaughter, courts have given judgment only for manslaughter, much more will juries, when the case appears doubtful, acquit of murder, though they should be fined for it by Kel. 50.
 judges. In the case of *Currie*, in this county, the jury 2 Hale 159:
 acquitted him, contrary to the express opinion of the two judges of the Supreme court who tried him. The reason is, juries judge from their hearts, courts from their heads; juries from their feelings, the unassisted dictates of nature, courts from an artificial system.

We say, then, this is but manslaughter. It is not a deliberate premeditated killing, but a sudden killing on provocation. Provocation by words excuses, unless there be a manifest intention to kill. Provocation by blows excuses, though there be an intention to kill. Words are sometimes a more severe provocation than blows. A man's feelings are according to the sensibility of his nerves, as well as the impressing force; and if a *furor* is raised, immaterial from what cause, this *furor* excuses.

It is evident, there was a *furor*, when this weak man so repeatedly offered to match himself in equal conduct against the strength of *Chalfant*. Yet *Chalfant* coolly and cruelly persisted in provoking him. When *Bell* lost all regard for his own life, and was ready, by combating with *Chalfant*, as it were, to run against a sword; how can you suppose, that he should regard the life of *Chalfant* who provoked him. In the fury of his mind, the

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stake fell in his way, and under an apprehension of an attack from superior force, he seized it, to resist and repel the approaching danger. If (said Mr. *Brackenridge*) *Chalfant* himself, on the bed of death, could have looked back on the transaction, conscious of his being the cause, he would have excused the prisoner, and, to have mercy himself with God, he would have called for mercy to *Bell*. If his spirit were in this jury-box, and I were pleading this cause to that spirit, it would say acquit him.

PRESIDENT. Society is instituted for mutual protection. It is true, that taking away the life of a murderer makes no compensation, but its example acts by way of terror, to preserve the lives of others. In all, or almost all nations, blood has been demanded for blood.

The laws must operate by certain rules, not the casual feelings of jurors; and jurors must judge of the facts, according to the certain rules of law. For miserable would be our situation, if our lives depended not on fixed rules, but on the feelings, which might happen to be excited in the jurors who were to try us. If, in the case of one man, compassion pervert the construction of the law, to acquit; in the case of another, resentment may pervert it, to condemn: and whenever guilt may thus escape from punishment; innocence may be no longer a shield. I therefore know no argument less proper or more dangerous, or to which juries ought to listen with greater suspicion and aversion, than that which must derive its force from confounding the authority of a court and a jury, instilling into the one a prejudice against the opinion of the other, and persuading jurors that they are at liberty to apply to facts a rule of their own, different from that which the law applies. The court is the mouth of the law. Whether the facts are so, or so, it lies with you to determine, according as you believe the testimony. Supposing them so or so; whether they amount to murder or manslaughter, is a question of law, for the court to determine. You may find, according as you believe or disbelieve the facts, and comparing the facts with the rules of law, that the prisoner is guilty, or not guilty, or guilty of manslaughter; or you may find the facts specially, without drawing any conclusion of guilt or innocence; leaving it to the court, to pronounce the construction

which the law puts on the facts found; but you cannot, but at the peril of violation of duty, believing the facts, say that they are not what the law declares them to be: for this would be taking upon you, to make the law, which is, the province of the legislature; or to construe the law, which is the province of the court.

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All killing is not murder; but if there be an unlawful killing, the law will presume it to be murder, unless the killer can shew, that it is not.

Murder is killing with malice. Any formed design of mischief may be called malice. Malice is a deliberate, wicked vindictive temper, regardless of social duty, and bent on mischief. This may be collected from previous circumstances, or circumstances attending the manner or fact of the killing. There may be malice, in its legal sense, when there is no actual intention of any mischief, but the killing is the natural consequence of a careless action, as riding a horse, or driving a carriage, through a crowd. Manslaughter is a sudden unlawful killing, without the circumstances of malice, cruelty, revenge, &c. involved in the technical word *malice*.

1 Hawk. 121.
2. Foster 256
—7. 2 L.
Ray 1487.

Madness excuses from punishment of every kind, for any crime whatsoever. Anger, a short madness, when provoked by a reasonable cause, excuses from the punishment of murder.

1 Hawk. 113.
130. 1 Hale
476. Foster
262-3.

You will not presume, that a killing existed, unless it be proved. But if a killing has been proved, you must presume, for the law presumes, malice, unless the killer shew, that he did it in a passion reasonably provoked. Whether passion or provocation, the prisoner must prove, they are never presumed, but malice, the contrary of them is presumed; and if he prove them not, you will presume malice, not any particular fact, or circumstance of malice, but malice in general. Nor is this presuming against innocence: for the killing being proved, a thing wicked in itself, it becomes necessary for the killer to shew a justification or excuse for it. Man is a free agent; and if he do an act evil in itself, it will be presumed to arise from an evil intention, till the contrary appear: for a man must be presumed to intend what he accomplishes.

2 Hale 60,
157-9. 1 Hawk.
124. Kel.
112. 2 L.
Ray 1493-4.

Cases of special verdicts are not applicable to this.—

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1793. Courts cannot decide facts, and, if juries do not find them, courts cannot presume them. But courts will presume malice from facts in the manner of killing: for that is a construction of law.

Halloway's case, Cro Car.
131. *Kel.* 127.

To exclude the presumption of malice, and, of course, to reduce the killing below the degree of murder, on the ground of passion, there must be both passion and provocation. Passion without provocation, or provocation without passion, is not sufficient. There must not only be both passion and provocation, but the provocation must be sufficient. For it is not to be supposed, that a rational man will, without reasonable provocation, suffer himself to be so far transported by passion, as to take away life; and it would be difficult to distinguish between a real passion, and a passion affected as a cloak for malice, if the law indulged passion without reasonable provocation.

Foster 296. 4. *Deliberate* killing, without *passion*, whatever may have been the *provocation*, is murder. For, if the killer was cool, and master of his passion, and had the full exercise of his judgment, the principle of responsibility thus remaining, he must suffer the full effect of his conduct.

Com. Di 15.
1 *Hawk.* 123.

What is reasonable or sufficient provocation is a fixed question of law, not variable, according to the degree of judgment or irritability of the killer. This, being of a nature not easily, if at all, to be ascertained, would be too precarious a standard to appeal to. And the law proceeds on the surer ground of established rules.

§ *Burr.* 2796. An attack, though slight, on the person, or a violation of the bed of another, from the high value, which the law sets on these objects, is a sufficient provocation, to extenuate a sudden killing in the heat of passion, and make it no more than manslaughter. It would be so, also, I think, if the personal attack were only menaced, but immediately approaching, and if under the terror, and in defence of that, an homicide were committed: for it has even been said, though this seems laying it down much too loosely, that words of *menace* of bodily harm would come within the reason of such provocation, as would make the offence but manslaughter. An attack on the person and safety of a friend is a provocation sufficient to extenuate to manslaughter a sudden killing, in the

5 *Burr.* 2796.
Foster 296.

1 *Hawk.* 108.

1 *Hale* 456.

14 *Co.* 87.

peril and defence of this friend. If a master, provoked by negligence or improper conduct of a servant; or if one man, provoked by contumelious or reproachful words or gestures of another; proceed to chastise the offender, with a weapon, and in a manner proper for chastisement, and not likely to kill; and an accidental killing of the offender ensues; the provocation is sufficient to make this killing but manslaughter. So, if, in such moderate and reasonable chastising, blows are exchanged, or if, on such affront, the parties proceed to combat, on equal terms, and he who gives the first blow kills the other in the encounter, there being no original malice in the killer, it is but manslaughter. But, farther than this, the law does not excuse, for if, on any slight provocation of words or gestures of contumely or insult, the passion of the insulted person shew itself in circumstances of unusual cruelty, transport beyond the just measure of correction, and revenge itself with a weapon, or in a manner, likely to kill, and do kill the person provoking him, it is murder. For it is settled, that no words or gestures, however contumelious, are a sufficient provocation, to extenuate such a killing, and make it only manslaughter. The law has never set so low a value on the life of man, as to say, that words are such a provocation, as, if the offended person strike with a weapon, or in a manner, likely to kill, and do kill, it will be but manslaughter. Such killing has always been held murder. For the law will not suffer, with impunity, a man to become so angry, for mere words or gestures of contumely, as, in his rage, to kill a man. It is a fixed principle, that, if from the weapon, or the manner of striking, an intention to kill may or must be collected, provocation by words only is not sufficient to make the killing but manslaughter: malice, a design of mischief, will be presumed, and the killing will be murder. I consider this as an established boundary, which the law sets to human passion; and I hold it dangerous to remove it. There would be no freedom of censure or irony, if you must, at the peril of your life, first measure the degree of another's patience. The law then says, while you touch not the person of another, death shall avenge the taking away of your life. When

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Foster 295.*Kel.* 64-5.*L. Roy.* 144.*1 Haw.* 124-5*1 Hale* 454 6.*Kel.* 129-30 1*Foster* 295.*Cro. El.* 772.*L. Ray.* 144.*1 Hale* 455.*1 Hawk.* 124*4 Com. Di.* 15*Com. Rep.* 15.*Kel.* 131. 55.

60, 65.

5 Burr. 2796*1 Hale* 455.

1793. you assault the person of another, you shall risk your own. Abstain from violence, and the law guards you. If you employ violence, you must hazard its being employed against you. I consider this as proper to preserve peace and safety, and to put the weak in a state of defence and equality with the strong.

Such is the law, and consistent with these principles are all the cases.

Kil. 131.

There is a case, which, at first sight, might seem to contradict this. *Williams*, a *Welchman*, on *St. David's* day, having a leek in his hat, a certain person pointed to a *Jack of Lent*, that hung up hard by, and said to him, look on your countryman; at which *Williams* was much enraged, and took a hammer, that lay on a stall hard by, and flung at him, but missing him, it hit another, and killed him. It was held, that he was guilty

— 132.

of manslaughter. But lord *Holt* observes, when he cites this case in *Mawgridge's* case, that the indictment being only for manslaughter, he could not, on it, be found guilty of murder: "but," adds he, "if the indictment had been for murder, I do think, that the *Welchman* ought to have been convicted thereof; for the provocation did not amount to that degree, to excite him designedly to destroy the person who gave it to him."

12 Co. 87.

In the case of the killing at the bowls, it was while the deceased was fighting with the friend of the killer: his friend was attacked and in danger. In *Rowley's* case,

Gro. Ja. 296.

the killing is expressly said, by *Croke*, to have been occasioned by a small cudgel; and thus, though death accidentally ensued, the chastisement may not have exceeded the natural measure, from the angry father of a bleeding son. In *Stedman's* case, the woman had struck

Foster 292.

the soldier, in the face, with a patten, and drew a good deal of blood. This was held to be sufficient provocation.

1 Str. 499.

In *Reason* and *Franter's* case, there was ground to believe, that there was an attempt to rescue. The

Foster 292-4.

deceased had brought down his pistols, and gave the first blow, accompanied with menaces to the officers. A pistol was heard to go off; both his pistols were discharged in the affray; and his sword was found drawn and broken. *Reason* and *Franter* were both wounded,

3 Burr. 2795.

and one of them with a pistol shot. In the case of *Taylor*, he was provoked by opprobrious words. The first blow

which he gave, on this provocation, was with a small rattan cane, not bigger than a man's little finger. And it was not, till after he had been collared, thrown down against a settle, shoved out of the room, and violently pushed out of the door, that he gave the wound with the sword. In *Mawgridge's* case, and in *Oneby's* case, the words of provocation came first from the persons killing, the first blows were given by them, and that being done in a manner that shewed malice, the killing, though after they had received wounds from the persons whom they attacked, was held to be murder. 1793.
Kel. 119.
L. Ray. 1485.
Str. 766.

In the case before us, two things are well conceded ; —1. That the killing of *Chalfant* by *Bell* is, at the least, manslaughter ; —2. That, if the cudgel or stake was previously prepared, it is murder. It is not doubted the killing was by the prisoner, and with the cudgel or stake, which has been produced before you. Nor is it denied, that if it were possible to presume, that the killing was on the old grudge, it would be murder. — 1 Hawk. 124. But it is said this cannot be presumed.

Though the court will not presume this, unless the jury find it ; yet, if the circumstances of the case, lead strongly enough to this presumption, the jury may find so. The circumstances of this case do not seem to lead strongly to this presumption. I also think the proof of previously preparing the stake is very light. You will however weigh those things, taking into view also the facility with which he could have seized the other weapons, the axe, &c. and the manner and purpose of applying either. 1 Hale 452.
Cro. Ja. 296.

But I put it on this point. No provocation, but words, has been proved. And the law does not consider words as such a provocation, as can excite a passion, in which, if a man strike another, with a weapon likely to kill, and thereby kill, the offence will be extenuated to manslaughter. When the provocation is only by words, such killing, notwithstanding the passion, is murder. This appears to have been such a killing. The stroke was given with a weapon likely to kill, insidiously, before the deceased was on his guard ; and the killing is murder.

The jury found him guilty of murder.

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On Saturday, 28th December, 1793, Brackenridge and Ross, moved in arrest of judgment, on the following grounds:—

Art. vi. § 5.

The present constitution, of this state, for the first time, gave authority in capital offences, to the judges of the county courts, the president being one. The constitution is in the nature of a commission, and rendering the presence of the president necessary, it ought to be shewn, that he was present. The caption of this indictment does not set forth this. Its caption is only, "at a court of Oyer and Terminer and Gaol Delivery, for the county of *Washington*," does not say before whom, nor that the president was one. It does not say, that the town of *Washington* is in the county of *Washington*. The court is not to go on their own knowledge. The record itself must shew to all posterity, and when memory is gone, that this proceeding was regular. In the case of the special commission, for the trial of the persons concerned in the rebellion of 1745, the proceedings were very minutely attended to, and the defects pointed out in this, did not exist in the indictments before that court.

Foster 1, 7.

Hawk. 359.

The caption of an indictment must set out the court, the jurors, &c. that the authority may appear.

This indictment concludes "against the act of Assembly." There is no act of assembly against murder.

The offence is not laid with sufficient certainty and consistency. It is stated, *that of this mortal wound Chalfant, from the said 14th day of November did languish, and languishing did live, and on which said 14th day of November, of the said mortal wound, died.*

These objections may be thought nice, and they touch not the merits. But the prisoner's life is at stake. And, in such case, the nicest objections will have weight.

Bradford, for the state. Suppose the president and other judges had been named, still strangers and posterity could not know, that these were commissioned, or that the governor, who commissioned them, was governor. The absurdity is glaring. Could I know, beforehand, what associate judges would attend? The constitution declares, that there cannot be a court of Oyer and Terminer without the president. The caption of this indictment is, at a court of Oyer and Terminer. Therefore the president must have been present.

The indictment concludes also "against the peace and dignity of the commonwealth of Pennsylvania.— 1793.
The words *against the form of the act of assembly* may be rejected as surplusage.

The court adjourned to 6th January, 1794, when their opinion was delivered.

PRESIDENT. *John Bell* having been committed to the gaol of this county, on a charge of killing *James Chalfant*, a precept was issued on 21st November, 1793, by me, as president of the court of Common Pleas of this county, and *James Edgar*, and *Matthew Ritchie*, judges of the said court, and justices, the president being one, of Oyer and Terminer and Gaol Delivery, within this county, directing the sheriff, to have the prisoners in the said gaol, and a competent grand jury, and traverse jury, of the said county, for their trial before us, or any two of us, the president being one, at the court house in the town of *Washington* on the 23d day of *December* then next following.

On the 23d *December*, the above named president and judges, and the two other judges, met at the court house, and a court of Oyer and Terminer and Gaol Delivery for the county of *Washington* was held. The sheriff returned the above precept, with a pannel of twenty-four grand jurors, as he had been directed. Of these seventeen appeared, and (*Isaac Leet* being foreman) were sworn as the grand jury for those courts.

To this grand jury a bill was sent up in the following words :

"*Washington County*, ss. } At a court of Oyer and Terminer and general Gaol Delivery for the county of *Washington*, held, in the town of *Washington*, on the twenty-third day of *December*, in the year of our Lord, one thousand seven hundred and ninety-three. The grand inquest that now is for the body of the county of *Washington*, upon their solemn oath and affirmation, respectively, do present, that *John Bell* late of the county of *Washington*, yeoman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the fourteenth day of *November*, in the year of our Lord, one thousand seven hundred and ninety-three, with force and

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arms, at the county of *Washington* aforesaid, in and upon one *James Chalfant*, in the peace of God, and the commonwealth of *Pennsylvania*, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said *John Bell* with a wooden stake, in length four feet, and in thickness three inches in diameter, which he the said *John Bell* in both hands then and there had and held, the said *James Chalfant* then and there feloniously, wilfully, and of his malice aforethought, did strike, giving to the said *James Chalfant* then and there, with the stake aforesaid, in and upon the left side of the head of the said *James Chalfant*, one mortal wound of the breadth of three inches, and the depth of two inches, of which mortal wound aforesaid the said *James Chalfant*, from the said fourteenth day of *November*, in the year aforesaid, at the county aforesaid, did languish, and languishing did live, on which said fourteenth day of *November*, in the year aforesaid, the said *James Chalfant*, at the county of *Washington* aforesaid, of the said mortal wound died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said *John Bell*, in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder the said *James Chalfant* against the act of assembly, in such case made and provided, and against the peace and dignity of the commonwealth of *Pennsylvania*, &c.—*Jared Ingersoll*, attorney general.”

This bill the grand jury indorsed, “A true bill,” with the name of the foreman subscribed to the indorsement; and so returned it.

Being arraigned on this indictment, *John Bell*, pleaded, that he was not guilty. The attorney for the state joined issue. The issue was tried, in the same court by a traverse jury duly returned by the sheriff, on the above precept; and this traverse jury found, that *John Bell* is guilty, in manner and form, as he was indicted.

Being demanded, at the same court, what he had to say, why judgment should not be passed on the finding of the jury, his counsel urged, in arrest of judgment, the following objections to the indictment.

2 *Hard.* 359.

&c.

Foster, 1, &c.

Const. v. 5.

That the caption of this indictment is defective and erroneous, not stating the judges before whom it was

taken, nor that the president was one, nor that the town of *Washington*, in which the court was held, is within the county of *Washington*, for which the court was held, and the jury summoned.

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That the body of this indictment is uncertain, repugnant, and void, alledging the assault and the stroke, on the 14th day of *November*, and stating, that, *from* the said 14th day of *November*, *Chalfant* languished and lived, and that *on* the said 14th day of *November* he died. If he languished and lived *from* the 14th day of *November*, he must have been alive after that day, and yet the indictment states him to have died on it. This is considered as a repugnancy which makes it erroneous.

That the conclusion of this indictment is also erroneous, stating the murder to be *against the act of assembly in such case made and provided*, when there is no act of assembly against murder.

For these reasons, the counsel for *John Bell* have moved, that judgment on this indictment and verdict be arrested; and this, it is said, will occasion no failure of justice, as he may again be tried on another and sufficient indictment.

In discussing these reasons, I shall invert the order of them, and beginning with the last, proceed backwards to the first, on which the chief stress seemed to be laid.

But let me premise, that, although courts have usually, in all capital cases, given way to very nice objections, it appears to me, that this inclination ought rather to be restrained than extended. I cannot but believe, that yielding to frivolous or formal objections, no way affecting the innocence or defence of an accused person, seems better calculated to reduce the law to a game of address, than to promote justice. And I am led to wish, that all exceptions to the form of the previous proceedings should be made before a trial of the merits, and that a defence on the merits should be considered as an admission of previous regularity, against which no objections should be afterwards received.

Two great men, at the difference of a century from each other, seem to have felt the same impressions; and if they were not led to the same conclusion, which I have stated, they have, at least, expressed themselves in stronger terms.

1793.

Lord *Hale*, whose disposition of tempering justice with mercy will not be disputed, thus delivers his opinion. "In favour of life, great strictnesses have been, in all times, required, in points of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof. More offenders escape, by the over-easy ear given to exceptions in indictments, than by their own innocence; and, many times, gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of government, and to the dishonour of God. And it were very fit, that, by some law, this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy."

Lord *Mansfield*, from whose notice few corruptions escaped, expresses, more obliquely, similar sentiments, and points out their true limits. "*Tenderness* ought always to prevail, in *criminal* cases, so far at least, as to take care, that a man may not suffer *otherwise than by due course of law*; nor have any hardship done him, or severity exercised upon him, where the construction may admit of a reasonable doubt or difficulty. But *tenderness* does not require such a construction of words (perhaps not absolutely clear and express) as would tend to render the law nugatory and ineffectual, and destroy or evade the very end and intention of it: nor does it require of us, that we should give into such nice and strained critical objections, as are contrary to the true meaning and spirit of it."

These sentiments appear rational and solid, and seem to lead strongly to the conclusion, which I have stated. But whatever my opinion or inclination may be, as to the state to which the law ought to be brought, if there be in it any fixed principle, which will render all, or any of these objections fatal to this indictment, it must fall: for, surely, a man's life ought not to depend on unpublished, or unwarranted opinions, but on settled and acknowledged rules.

With these impressions, I proceed to examine the preceding reasons in arrest of judgment.

1. It is urged, that the conclusion of this indictment,

alleging the offence to be *against the act of assembly in such case made and provided*, when there is no act of assembly prohibiting it, is erroneous, and vitiates the whole. 1793.

How these words came to be introduced into this indictment, I do not know: I see no use for them. But what harm they can do, more than any other superfluous words, I am equally at a loss to explain. Strike them out, and the conclusion of this indictment is good. If it be good without them, they are within the rule, that *Co. Lit. 303 b.* surplusage words do not vitiate.

So would I say, on principle, were there no precedents to warrant me. But, however it may have been doubted, or doubtfully spoken of, I think it settled, that an indictment for an offence at common law is not vitiated by a conclusion against the form of the statute; for, if an offence at common law is prohibited by statute, this takes not away the indictment at common law. The statute is cumulative; and if an indictment for such offence conclude against the statute, though the offence be not made out against the statute, judgment may be given at common law. Is there any reason, why the rule should not be the same, when there is no statute against the offence, as when there is no offence against the statute? Murder is an offence at common law, and rejecting the words "*against the form of the act of assembly, in such case made and provided*," the conclusion of this indictment, as an indictment at common law, is right. *2 Hawk. 356. 2 L. Ray. 1104, 1163. Salt 376. Doug. 441-5. 1 T. Rep. 121. 1 Vent. 103. Salt 212.*

2. The second objection to this indictment is, that it alleges the offence uncertainly and repugnantly, and is therefore erroneous: for, *in legal terms*, it says, that *James Chalfant* was alive, after the 14th day of *November*, and says also, that he died on the same 14th day of *November*.

Both these allegations cannot be true. And it is laid down as a rule, that, where one material part of an indictment is repugnant to another, the whole is void; for the law will not admit such nonsense and absurdities in legal proceedings, which, if suffered, would soon introduce barbarism and confusion. *2 Hawk. 325. Cro. El. 196.*

Now, in an indictment for murder, it is material to allege both the day of the stroke, and the day of the *2 Hawk. 263.*

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1 *Bolfr.* 203.*Hughes' abr.*

1084, 1094.

Cro. El. 738,

739, 196.

4 *Co.* 41. 2.

death; that it may appear that the death was within the year and day after the stroke; for, beyond that time, the law presumes not the stroke to be the cause of the death. The allegation of both being therefore necessary, if either be alledged on an impossible day, as the 31st of June, or if the murder be alledged to have been on a day different from the day on which the death is alledged to have been, though on the day on which the stroke was given, as if the jury find the stroke given on the 1st, and the death on the 10th of June, and so conclude that he murdered him on the 1st of June, when it appears from the indictment, that he was alive: this is repugnant and void: for though the stroke in fact killed him, yet, till the death, it was but a trespass, and is not to be made a felony by relation.

Whether this indictment lays the death on a day, *on* and *after* which *Chalfant* is shewn by the same indictment, to have been alive, and whether, therefore, the indictment be repugnant and void, depends on the construction to be put on the words "*from the said 14th day of November languishing did live,*" and on their importance in this indictment. In fiction of law, there are no parts of a day, yet the fact is otherwise, and, wherever it is material or proper, may be averred. Thus it might have been stated here, that the stroke was given at one of the clock, on the 14th day of *November*, and that of that stroke *Chalfant* languished, and languishing did live, till six of the clock on the same day, and, at six of the clock on the same day, he died of it.

Before it can be admitted, that this indictment shews, that *Chalfant* was alive after the 14th day of *November*, it must be established, that *from* the day of the stroke, is *exclusive* of the day of the stroke; or, in other words, must mean sometime *after* it. If this be its necessary meaning, and the averment, that, after the stroke, he lived languishing, be a material part of the indictment, the principles already laid down must destroy it.

But, though *from* the day may be properly or usually, and was long considered as certainly equivalent to *immediately after*, it seems now, according to the subject, to admit of a different construction, and sometimes to *include*, sometimes to *exclude* the day mentioned.

These words express their meaning very awkwardly,

Co. Lit. 46. b.

1 Wils. 176.

2 Wils. 168.

Corup. 714.

but still not doubtfully. The whole taken together is, that *Chalfant* lived sometime after the stroke, but died on the day on which it was given.

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But are they a material part of this indictment? I think not; and I think them as useless as they are awkward. It is material to aver, that the stroke was given on a certain day; it is material to aver, that, on a certain day, the person stricken died of this stroke; but what passed between the stroke and the death, it is not material to aver: The averment of the stroke, of the death, and of the time of each, shewing the death to be within the year and day after the stroke, with the averment that the stroke occasioned the death, completely ascertains the homicide, and whether the death was instant, or the party lived, languishing or otherwise, after the stroke, is no material part of the indictment; a repugnancy in it will not vitiate an indictment otherwise good; and it may be struck out, without, in the least, altering the nature of the accusation.

1 *Hawth.* 119.
1 *Hale* 428.
Rew's case,
Kel. 26.

If it be struck out, the indictment will state, "that *John Bell*, on the 14th day of November, 1793, with force and arms, at the county of Washington, in and upon *James Chalfant*, feloniously, wilfully, and of his malice aforethought, did make an assault, and with a wooden stake, which he then held in his hands, did, feloniously, wilfully, and of his malice aforethought, strike the said *James Chalfant*; giving to the said *James Chalfant*, then and there, with the stake aforesaid, in and upon the left side of the head of the said *James Chalfant*, one mortal wound of the breadth of three inches, and the depth of two inches, on which said 14th day of November, in the year aforesaid, the said *James Chalfant*, at the county of Washington aforesaid, of the said mortal wound died."

This is a sufficient allegation of murder; and, though not so elegant, is as precise and intelligible, as any sentence of a *Robertson*, a *Gibbon*, or a *Junius*: and an indictment will no more be quashed, for inelegant *English*, than for false *Latin*.

Gro. El. 108.
5 *Co.* 122.

On these grounds, therefore, I am not at liberty to say, that judgment on this verdict shall be arrested; and I proceed to examine the only remaining reason urged, and chiefly relied on, for this purpose.

3. It is objected to the caption of this indictment,

1793. that it states not the judges, before whom it was taken, and so it appears not, that they had authority; for, without the president, no court for the trial of murder could be held, by the other judges of the court of Common Pleas; and that it states not that the town of *Washington* is in the county of *Washington*, for which the court was held, and in which the offence was committed.

To this it has been answered, that this is requiring too much; for it could not be previously known, what judges would attend, and it might be farther required, to prove that they were judges, and that the governor who commissioned them, was the governor. It has been farther and better answered, that the caption states the indictment to have been taken, at a court of Oyer and Terminer and Gaol Delivery, for the county of *Washington*, held in the town of *Washington*, and it must be presumed, from the provision of the constitution, to have been held before the president and a competent number of judges, of the court of Common Pleas of that county, or before some other judges, forming a competent court of that description, and to have been held within the county, for which it was held.

²Hale 185-6. Many averments are necessary or proper in an indictment for murder, which yet need not be proved with precision. The time of the stroke, and of the death, the weapon used, and how, and in what part of the body, the stroke was given, and the dimensions of the wound, are all necessary or proper to be averred; but if it come out in proof, that the time of the stroke, and of the death, was different, or that the stroke was with another weapon, or in another manner, or on another part of the body, or that the wound was of other dimensions; the nature of the offence is not thereby materially altered, a sufficient charge of murder is made in the indictment, and if sufficient, though in circumstances different, evidence of murder be given at the trial, the murderer will be convicted by the jury, and judgment, on this conviction, will be given by the court.

If the judges must be named in the caption of an indictment, and, in order to name them there, it were necessary to know them before the court, there are two plain rules, without any aid from divination, for naming them safely. Those may be named, who signed the pre-

cept, or all in commission may be named. And if the president and any one other who signed the precept attend, it is sufficient. It is not *proof*, but *averment*, that is looked for in an indictment. The proof comes afterwards. If indeed it appear, on examination, that he, who is stated as president, is not president, as having no commission, or a commission from one who was not governor. The whole proceeding is void. 1793.
2 Hale 167.

But to meet the objections directly. It cannot be denied, doubted, or dissembled, that indictments have been quashed in *England*, for reasons, at least, as light, as those urged against this indictment. An indictment was quashed, because the grand jury called it an *indictment*, before it was found a *true bill*. Rex v Brown
1 L. Ray 592.
Salk. 376.

It is laid down as a general rule, that every caption of an indictment is erroneous, which sets not forth, with proper certainty, the court, in which, the jurors, by whom, and the time and place, at which, the indictment was found. The caption of an indictment taken at the sessions must mention before what justices it was taken, and set forth the nature of their commission, or it is erroneous, and will be quashed; as not sufficiently shewing a competent jurisdiction. 2 Hawk. 358-
61. Cro. El.
738. 1 Mod.
24. Telv. 466

Indictments have been quashed for not naming the jurors, who found them, or stating that they were twelve in number, or of the county, or precinct, or that they were honest and lawful men, or that they enquired upon oath. 2 Hawk. 361.
2 Hale 167.
Cro. El. 654.
vid. Cro. Ja.
41.

Indictments have been quashed, because the caption set forth no place where taken, or shewed not with sufficient certainty, that the place set forth is within the jurisdiction of the court, as at a sessions of the peace holden for such a county at *B.* without shewing in what county *B.* is, otherwise than by putting the county in the margin. 2 Hawk. 362.
Cro. El. 137.
606. Cro. Ja.
276. 2 Hale
166.

If this indictment must be examined on these principles, it cannot stand.

But against these principles, it may be stated, that this indictment appears from the caption to be taken at a court of Oyer and Terminer, and general Gaol Delivery, and it may be asked whether this, by implication, does not sufficiently state, that it is taken at a court having authority to take and try indictments for murder. Const. Penn.
v. 4.

1793. Where the caption of an indictment is at a *general sessions* of the peace, it is not necessary to stile any of the justices of the *quorum*, for that is sufficiently shewn, by shewing that the sessions was a general sessions, which could not be held without some of the *quorum*. *A fortiori*, shall this be presumed in a court of Oyer and Terminer, &c. a court of higher nature than the sessions of the peace, and scanned by rules less nice.

Rex v. Boyce
4 Burr. 2073
-84-6.
3 Com. Dig. 534.
On an indictment tried at a court of Oyer and Terminer, &c. and removed into the King's Bench, objections, not unlike the present, were there taken and over-ruled; and sentence of death was passed on the defendant. On the authority of this case, the editor of the new edition of *Comyns' Digest*, states, that it is not necessary, that the record should set forth the commission of gaol delivery, or mention the judges' name, or say he was of the *quorum*. If it say the king's justices, it is enough.

4 Com. Dig. 59.
I shall not here enquire into the authority of justices of the peace in quarter sessions, to take indictments. This case is at a court of Oyer and Terminer, &c. and, besides, my opinion is formed upon other principles.

1 L. Ray. 710
-1.
In all cases of indictments, quashed for reasons such as I have stated, and such as are urged against this indictment, they have, so far as I have been able to discover, been indictments removed out of an *inferior* court into the King's Bench. The judges of the court of King's Bench could know nothing more of the proceedings, than what they could discover on the face of the record sent up, and if, there, they cannot find, or necessarily presume competent jurisdiction and regularity, they have nothing else to which they may resort for further information; and, competent jurisdiction and regularity failing to appear, the indictment must be quashed.

1 Felv. 46. Cro.
El. 489. Cro.
Ja. 184.
2 Com. Dig. 610.
And, in the court of King's Bench, it seems to be a principle, by which they are governed in their examination of the proceedings of inferior courts, that, if such proceedings, in setting forth the stile of the inferior court, do not shew their authority, whether by charter, or prescription, and do not shew the names of the judges of such court, they are erroneous: for all jurisdiction rests in the crown, and, therefore, the king's court ought to be informed how the authority is derived; and, with-

out an express statement of the names and authority of the judges in the inferior court, the king's court cannot recognize them. 1793.

There is another principle, which seems to have governed decisions in the court of King's Bench, on indictments taken at sessions of the peace. They have considered the authority of justices of the peace as of two kinds; that, by one, they acted as mere conservators of the peace; by the other, they were empowered to hear and determine offences: the first made them guardians, the last made them judges; but their name *justices* did not imply both; and, therefore indictments taken before them as justices, without the addition of their authority of trying as judges, were holden to be bad. This will not be wondered at, when writs of *certiorari*, to remove indictments taken before them as justices, have been holden to be bad. ^{2 Hawk. 58-9. 359-60. 2 Hale 43-4. 166. Rex v. Carter, 1 Str. 442.}

These principles seem to furnish an explanation of all doubts respecting this indictment. The indictments, which were quashed in the King's Bench in *England*, were quashed, not because they were *not* properly taken, but because that court could *not see*, that they *were* properly taken. Their principles prevented them from looking beyond the paper sent up to them, and *it* did not shew *all* the truth.

But do we stand in this situation? I am called on to doubt whether I was present at a court, at which I know, that I was present. The other judges are called on to doubt, whether any of them were present at a court, at which each of them knows, that all were present; and both they and I are called on to doubt, whether this court house, where we now sit, be within the county of *Washington*. To the common understanding of mankind, such doubts must appear very chimerical and absurd.

But, to rest on the record only, and not look beyond it, but proceed technically; must we not take the whole of the record together? Or must or can we, when objections are made to a part, wink so hard, as not to see, or absolutely shut our eyes to the rest, which would clearly explain, and fully answer these objections? It is impossible, that we should be compelled to look only to see errors, and shut our eyes against the cure of those

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errors, when both error and cure appear on the *whole* of the proceedings. In examining this indictment, therefore, we must, together with the indictment, take into view, the precept issued for holding this court, the return of jurors made by the sheriff to this court, the minutes taken, by the clerk, of the sessions and proceedings of this court, the names of the grand jury sworn to present, and the traverse jury sworn to try, this bill of indictment. These general records are part of each particular record, and will be annexed to each, as occasion requires. Annexing them, therefore, to the record of this indictment, it will appear, that it was taken at a court of Oyer and Terminer and general Gaol Delivery, held by *Alexander Addison*, president, and his associates, justices, assigned to hear and determine all offences within this county, and deliver the gaol of this county of all prisoners; that it was found on the presentment of *Isaac Leet* foreman, and sixteen other grand jurors particularly named, duly returned and sworn for that purpose. The only thing wanting, to answer all the objections, is that it does not appear, on the mere records, that the court house in the town of *Washington* is within the county of *Washington*. I think this, from all circumstances, sufficiently implied, and I think the clerk sufficiently warranted, nay I think it his duty, in making out this record to a superior court, to insert, not only the names of the judges and jurors, but to annex to the name of the place, that it is in the county of *Washington*. His records are for this county only; and all the proceedings which he records are in this county. Here then are full materials for making out an unexceptionable record to a superior court. If, from these materials, a formal record were returned to a superior court, that court would confirm it. And if the superior court would confirm a formal return of the materials before us, we must confirm the proceedings, on sufficient materials, without form; and, as we yet sit in the same court, and the record is yet in our breast, we may even supply some materials, which may seem wanting. We may surely add, if we think it necessary, the name of any or each of the attending judges, and the name of the county, in which this court house and town is. Such a supplement, to the materials before us, would leave no objections to the proceed-

Long's case.
Cro El. 490.
5 Co. 120.

ings on this indictment, but to the formal disposition of them; and that, to us, is no objection. When we are required by a superior court, we will put them in form. The materials, without form, are sufficient for us.

1793.

It only now remains to examine whether these opinions be consistent with established rules; for, if they be, they are decisive of the present question.

It is true, that the statutes of jeofails extend not to criminal proceedings; but it is also true, that, before those statutes, there were amendments at common law, and that the amendments at common law were applicable to criminal, as well as civil, proceedings.

It is true, that the court cannot amend the body of an indictment; for it is the finding of the grand jury.— But it is also true, that the caption of an indictment is no part of the indictment, or finding of the jury, and no part of the description of the offence. What then is the caption of an indictment, as described in those books, on whose authority the exceptions are founded? It is left as a thing of course, to be drawn up by the clerk of the court, when occasion shall require. It is the style or preamble, or return that is made from an inferior court to a superior, from which a *certiorari* issues to remove, or when the whole record is made up in form: for whereas the record of the indictment, as it stands on the file, in the court wherein it is taken, is only thus,—“*The jurors of our Lord the King, upon their oaths, do present,*” when this comes to be returned upon a *certiorari*, it is more full and explicit, viz.—“*Norfolk, at a general session of the peace, held at S, in the county aforesaid, &c. before A. B. &c. by the oath of E. F. G. &c. honest and lawful men, &c.*”

^{2 Hawk. 348.}
^{2 Hale 165.}

An indictment taken before justices of the peace, and removed into the court of King's Bench, was objected to, because it did not appear, that the place, where it was taken, was within the division for which the justices were appointed. The clerk of the peace was commanded, to bring in the record itself, to be viewed, and if, on a view of the record, a mistake appeared in the certificate of the caption, they would cause it to be amended. The caption of an indictment from any place, being left as a thing of course to be drawn up by

^{Thorney's}
^{case. Cro. Ja.}
^{276.}

^{2 Hawk. 348.}
^{2 Hale 168.}

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Rex v. Fawcett
1 Mod. 24.

Rex v. Morgan, 1 L. Ray
710.

the clerk of the court, when occasion shall require, may, on motion, be amended by him, so as to make it agree with the original record, at any time, during the term, in which it came in, but not in a subsequent term; but in a subsequent term, the clerk, who returned it, shall be fined, for his informal return. A presentment was quashed, because it did not state, before whom the sessions were holden; and justice *Twisden* said, the clerk of the peace ought to be fined, for returning such a presentment. An indictment for a riot was removed into the court of King's Bench, and, on not guilty pleaded, was tried at the Assizes. On verdict for the king, among many exceptions taken and over-ruled, the one relied on was, that, in the caption of the indictment, it was not said of the jurors, that they were sworn and charged. To this the counsel replied, there is a great difference between a record made for *Nisi Prius*, which is always made briefly, and an indictment removed, with intent to be quashed. The words "*on oath*" supply the omission of "*sworn and charged*."—The whole court held it good.

From this statement I conclude, that the caption of an indictment is to be considered not so much as an original, as a formal transcript of other materials, in the records, or, during the term, in the breast of the court, and, when occasion requires, made up in form, by the clerk, from the materials necessarily before him. If, therefore, there be any defect in the caption of this indictment, we have sufficient materials to amend it; and, if so, we cannot yield to the objection, and cannot, for any of the reasons urged, arrest judgment on this indictment.

Sentence of death was passed on the prisoner. He afterwards broke jail, and escaped, but was retaken. However, the governor pardoned him. And, I believe, he left this country.

ALLEGHENY COUNTY,

March Term, 1794.

ADAM BIRCHFIELD, Administrator of WILLIAM
REDDEN, v. JACOB CASTLEMAN.

AN action of covenant on a conveyance from *Castleman* to *Redden*, of all right and title in seventy acres of land, for 70l. dated 13th January, 1781, with a warranty against all claiming by improvement. The land is near *Pittsburgh*, and was then in *Westmoreland* county. The plaintiff produced a copy of an ejectment for this land, brought in *Westmoreland* county court to July term, 1781, by *William Boniface* against *Redden*; in which, after issue joined, and a rule for trial, there was a judgment *nisi*, at April term, 1785; and an *habere facias possessionem* and *feri facias* for 3l. 16s. 11d. costs returnable to July term, 1785.

1794.

Brackenridge, for the plaintiff, then offered to prove, that, at the time of the execution of the deed, on a conversation respecting any claims, which might be brought forward, it was agreed between *Castleman* and *Redden*, that *Castleman* should defend the suits, which might be brought, and *Redden* should pay half the costs.

Leave was given to introduce this proof, reserving the point, and making it a part of the record, that the defendant might have the advantage of it, either on a motion for a new trial, or on a writ of error.

It was then proved by the subscribing witness to the deed, who was present at the bargain, that *Castleman* (being acquainted in the country, and *Redden* a stranger) agreed, that, if any suit were brought against *Redden* for this land, he would carry it on; and *Redden* agreed, that he would pay half the costs. *Boniface*, who brought the ejectment, proved, that he had lived on the land for six months, and made an improvement on it, in 1779; that *Castleman* "stood the suit at *Westmoreland*,

1794.

to try the title;" and that, when he brought the ejectment, in *Westmoreland*, he had no warrant for the land, but afterwards, in *December*, 1784, procured one.

Ross, for the defendant. *Castleman* was to defend against improvements. The proceedings in ejectment are irregular. *Redden* ought to have defended the suit; he did not, for he suffered an irregular judgment to be obtained. After issue joined, how could there be judgment without a trial by jury, unless the defendant confessed it. *Redden* suffered *Boniface* to take out a warrant first, having lien by five months after the office opened. *Castleman* would have taken out a warrant, if he had not sold to *Redden*; and *Redden* ought to have done it, and secured the land. There is no evidence, that *Redden* furnished *Castleman* with half the costs of the ejectment, as he undertook to do.

Brackenridge, for the plaintiff. *Redden* was dead before the judgment. The letters of administration are dated in *August*, 1784. *Redden* would have acted dishonestly in taking out a warrant, for the land on which another had made an improvement.

PRESIDENT. If *Castleman* had notice, he was bound by his agreement, to defend the ejectment, and if he did not, he must take the consequences of the recovery against *Redden*. Though *Redden* was to pay half the costs, I see no reason rising out of this evidence, as now given, to prevent his recovering damages now. If the costs of the ejectment were meant, it seems he has paid them all. If the expences of *Castleman* in defending were meant, he only could ascertain them; and he ought to have ascertained and demanded them. Until he do this, *Redden* is in no default; and of doing this we have no evidence. A reasonable excuse for delay, in taking out a warrant, arises from the ejectment brought, immediately after the purchase of the land; for, in the trial of this ejectment, no warrant obtained after the commencement of the suit, could be given in evidence.—Pending the ejectment, the Board of Property would have given no patent, and they would have been governed by its decision. There was no title from the Land Office, that could have been given in evidence on that trial; and the event of that trial must have depended on the settlement or improvement right, which *Castle-*

man warranted to *Redden*. This settlement or improvement right was the very thing, which *Redden* bought from *Castleman*, and which *Castleman* warranted to him: it was the very essence of the bargain, and *Castleman* has failed in his warranty of it.

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The jury found a verdict for the plaintiff, for 133*l*. 12*s*. 6*d*. damages, which was the amount of the price paid, and the interest, and one half of the costs in *Westmoreland*.

At *December* term, 1794, a new trial was moved for. *Woods*, for the new trial. If *Castleman's* title to this land can be examined, it will be found better, than the title of *Boniface*. And I would not move for a new trial, if I were not convinced, that injustice is done by the verdict, which I now move to set aside.

*Castleman* was not bound to warrant against any loss accruing from *Redden's* neglect of taking out a warrant. The judgment in *Westmoreland* is irregular, and therefore not more to be regarded, than if it had been before a justice of the peace. The turning *Redden* out of possession on this judgment, is therefore irregular and a trespass. *Castleman* was only bound to defend against a regular recovery, not against trespasses. The deed does not bind *Castleman* to defend an ejectment, but, after a defence by *Redden*, and an eviction of him, to make good to him the loss. The admission of any parole testimony, varying this obligation, is inadmissible. This 437.  
parole testimony is an additional contract, and a ground 2 *Bla. Rep.*  
of an action on the case. The action brought is covenant on a deed. The admission of this evidence is joining, in one, two actions, which cannot be joined. 1249.

*Brackenridge*, for the plaintiff. Whether the judgment be regular, or not, there was an *habere facias possessionem*, and we have been turned out of possession. But it is immaterial, whether the judgment was regular or not; if *Castleman* was bound to defend, the ejectment, it was his business to see to the regularity of the judgment.

The question therefore really turns upon this point; was the parole evidence admissible or not?

It was not to vary the agreement. It was only proof of a collateral agreement made at the same time; as, on 2 *Bla. Rep.*  
a contract of lease, you may prove, by parole, who was 1249.

1794.

Dall. 424.

bound to repair. It is true, we could not, by parole proof, shew that more land was sold, or for a higher estate, than the deed shews, but we may prove the collateral matter, of the manner, in which the warranty and defence was to be made.

At *March* term, 1795, the opinion of the court was delivered.

PRESIDENT. This action is founded on a covenant "to make good a tract of land, from all persons claiming, except the lord of the soil, of any legal improvement, made before or after the improvement purchased by *Castleman*," who conveyed the land to *Redden*, with this covenant inserted in the conveyance, on 13th *January*, 1781. At the trial of this action, last *March* term, the plaintiff produced an exemplification of proceedings in an ejectment in *Westmoreland* county court, brought by *William Boniface* against *Redden*, for this land, to *July* term, 1781. This exemplification states an issue joined, and, afterwards, at *April* term, 1785, a judgment *nisi*, and to *July* term, 1785, an *habere facias possessionem*, and a *feri facias*, for 3*l.* 16*s.* 11*d.* costs.

This evidence was, *prima facie*, sufficient to support the action: and here, till something to defeat it appeared, the plaintiff might have rested. But his counsel then offered to prove, that, at the time of the sale, and of the execution of the deed, it was agreed by the parties, that, if any suit was brought against *Redden*, *Castleman* would defend it, and *Redden* would pay half of the costs.

This parole testimony out of the deed was objected to, but we admitted it, reserving the point, and making it part of the record. The proof was then made, and it was also proved, that *Castleman* "stood the suit at *Westmoreland* to try the title;" that *Boniface* had then, no legal title for the land, but had lived six months, and made an improvement on it, in 1779. On this evidence, the jury here found a verdict for the plaintiff, for the amount of the purchase money and interest, and of one half of the costs in *Westmoreland* county court.

The counsel for the defendant, alledging that the merits are in his favour, moved to set aside this verdict, on these two grounds,

1. That the judgment in *Westmoreland* county court, being after issue joined, and without a trial, is irregular,



and not to be regarded. There is, therefore, no legal ouster of *Redden*, and *Casileman* is not bound to defend against illegal acts. 1794.

2. That the parole testimony ought not to have been admitted, as it is a separate undertaking altering the nature and effect of the covenant; and its admission amounts to joining an action on the case, with an action of covenant. <sup>1 *Powel Contr.* 431.</sup> <sup>2 *Bla. Rep.* 1249.</sup>

The plaintiff's counsel, observing, that the judgment, whether regular or not, had turned *Redden* out of possession, confined the argument to what he considered as the only point in the case, the admissibility of the parole testimony; which he supported, as not altering the contract, in any material point, but establishing a collateral agreement, explaining the manner, in which the contract was to be executed; as, in a lease, you may shew who was bound to repair. <sup>2 *Bla. Rep.* 1249.</sup>

The question comes before us now in a shape, which excludes any discovery of merits in favour of the defendant. But, if the recovery in *Westmoreland* was proper, or if the parole testimony admitted be true, the merits are against him.

But whether the testimony be true or not, if its admission was improper, the verdict must be set aside; unless there be other circumstances in the case, which render it of no weight, in either scale, and incapable of biasing the decision towards either side, or at least, the successful side, of the question.

I cannot therefore say, that there is but one point, the admissibility of the testimony, in this case.—For though, if the testimony be admissible, the verdict must stand, it will not follow, that if the testimony be inadmissible, the verdict must be set aside. To set the verdict aside for inadmissible testimony, such testimony ought to be also material. For if it be altogether nerveless, and there be other circumstances in the case, which would necessarily make the verdict such as it is; why set aside a verdict for admitting testimony, however incompetent, that was altogether neutral and immaterial? If the testimony should be supposed inadmissible, still the verdict must stand, if the recovery in *Westmoreland* must be considered here as proper.

There may therefore be too points in this case, but

1794. if either of them turn out in favour of the plaintiff, his verdict must stand.

Were it necessary to give an opinion on both, I would say, that both points are in favour of the plaintiff.

An execution ousting *Redden* from this land, and a judgment of a court of competent jurisdiction, warranting this execution, have been shewn. It was not necessary to shew more. It was not necessary to state all the proceedings previous to the judgment. Such statement is superfluous, and, if imperfect, we ought rather to presume a defect in the statement, than an error in the court. The court had jurisdiction, and we ought to presume a proper exercise of it. And though the proceedings had been irregular, the ouster by this execution could be no trespass. The case put, of a justice giving such judgment, is not similar. He has no jurisdiction; and though he should proceed with all the solemnities of a competent court, his acts would be void; and his officer a trespasser.

But granting, that because no trial is stated, we should believe, that no trial existed, I should hesitate greatly to invalidate a judgment, while I could not remove its effects. We are not a court of error, to correct the judgments of other county courts. A court of error could have annulled the judgment, and ordered restitution of the land. We cannot do this.

True, on this first point merely, we cannot know, that *Castleman* was actually to be considered as a party to the ejectment in *Westmoreland*; and, therefore, it may be said, he ought not to be affected by it, without an opportunity of impeaching it. And though, as between the parties, we certainly have no power to invalidate an existing judgment of a competent court of equal authority, yet, as between strangers, there seems more ground for contending the point. But, considering the nature of his engagement to warrant, was *Castleman*, after notice of the ejectment (and he had notice, for it is proved, that he "stood the suit") in the situation of a stranger? Was he not competent, was he not bound, to defend it? I shall say more of this afterwards. If he did not defend the ejectment, must he not stand to its decision; or was *Redden* obliged to go to the *dernier* resort of courts of error, before he could come at *Castleman*? Having

had judgment against his title, in a court of competent jurisdiction, must he examine all the irregular proceedings of this court, before he can call for his money? Must he bestow more money and time, in costs, expences, attendance, &c. in expectation of recovering an adequate recompence from *Casileman*? Perhaps he was not able, to prosecute the suit farther. Would it not have been reasonable for *Casileman*, if he meant to dispute the proceedings of *Westmoreland* court, to apply to *Redden* (if this was necessary) for leave to use his name, and, at his own expence, to have the proceedings set right, and the title, which he sold, fairly investigated? What are we to infer from a neglect of this? Had *Redden* refused to lend his name, this might have been evidence of collusion with *Boniface*; and collusion, or fraud, or improper conduct, on the part of *Redden*, would have been good evidence in favour of *Casileman*, against the most regular judgment; for no man can found his claim in fraud.— And though we should hold ourselves incompetent, to examine the irregularity of the proceedings of a court of equal authority, we have nothing to restrain us from examining the fraud of the parties.

On the other point, I am of opinion, that the evidence was properly admitted.

It is a principle of common law; and by the statute of frauds rigidly applied to some particular cases, that parole proof shall not be received, to vary, augment, or diminish a complete deed or writing. Such proof is particularly condemned, if it affect the writing in a material part; as if, in a will, it alter the disposition of a legacy, or, in a conveyance of one parcel of land, it convey also another, or, in a lease, it vary the term or the rent. But if the proof offered tends to affect the writing only in an immaterial part; or to establish something collateral, as, in a lease, who ought to repair, or to wave part of the agreement; or, where the writing might operate in more ways than one, to shew the intention of the parties, which way it should operate; or to rebut an equity; courts discover less nicety, and will admit the proof.

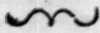
The principle is sound, and ought to be adhered to: for deeds and writings would be altogether useless, if they were liable to be annulled or explained away, by

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*Brown vs. Selwin, Ca. temp. L. Talbot 240.*  
*4 Bro. Parl. Ca. 179.*  
*Meres v. Ansel, 3 Wils. 275.*  
*Preston v. Merceau, 2 Bla. Rep. 1249.*  
*Lord Cheney's case, 5 Co. 68.*  
*See also Legal v. Miller, 2 Vesey 299, and Vesey jr 404.*



1794.



parole testimony. The inducement to perjury would also be strong. At the same time, the inconvenience would be great, if oversights, omissions, and mistakes, in points doubtful or collateral, or less essential, could not be remedied; and the danger of perjury, by admitting parole proofs, here, seems to be less.

The application of these principles, as in all cases, where the boundaries are obscure, seems to be attended

*Brown v. Selwyn, Ca. temp. L. Talbot 240.*

*4 Bro. Parl. Ca. 179.*

*2 Alk. 375.*

*See Nourse v.*

*Fineb, Vesey*

*ju. 357-62.*

*Meres versus*

*Ansel, 3 Wils.*

*275.*

with difficulty. In one great case on this point, the master of the rolls admitted the proof, but on appeal to the chancellor, it was rejected, though, it was said, with some remorse. His decree was appealed from; but the House of Lords affirmed it. In another case lord Mansfield, at *Nisi Prius*, admitted the proof, and reported satisfaction with the verdict; but the court of Common Pleas rejected it, and ordered a new trial. It will, therefore, be no matter of surprise, if counsel on both sides seriously entertain opposite opinions, or if our opinion should, by one side, be considered as erroneous.

The covenant here is, in fact, a warranty of *Castleman's* improvement title, against all other improvement titles. The plaintiff shewed, that a judgment was recovered against his title, in favour of another improvement title. He had then shewed enough, and needed no further proof, till the objection was made to the regularity of this judgment. The parole proof was offered to shew, that the judgment was, in fact, against *Castleman*, for he was bound to defend. Perhaps then, it is not refining too much, to say, that the proof was not so much directly to maintain the action, or a part of the covenant, as to repel an objection made to the contingent event, on which there should be a recovery against *Castleman*. Has it not the appearance of a collateral matter, as if, in an action for rent, one of the parties shewed a failure to repair, or a sum laid out in repairs, and the other offered proof, that, separately from the rent, the obligation to repair lay on him; or proof of a subsequent agreement to pull down, instead of repairing, a house found not worth repairing.

*2 Bla. Rep. 1249.*

*Legal v. Miller, 2 Vesey 299.*

This covenant is a warranty, or agreement to indemnify. Let us consider the nature of this obligation.

A creditor, for a debt contracted by a wife, having recovered against the husband, who had a bond of in-

demnity against his wife's debts, an action was brought on this bond by the husband. In this action, justice *Buller* says, "If a demand be made, which a person indemnifying is bound to pay, and notice be given him, and he refuse to defend the action, in consequence of which, the person indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying, that the defendant in the first action was not bound to pay the money."

1794.  
*Duffield vs. Scott* 3 T. Rep. 374, 377.

By the antient law, if the right of land or of a chattel was disputed, the possessor might call into the action any person bound to warrant it; and the warrantor then became, in fact, the defendant, and was affected by all the proceedings. Lest a landlord might collusively suffer a claimant to recover judgment against him in a real action, and, thereby, turn out his tenant, before the expiration of his term, an opportunity was allowed the tenant, to question the fairness of the recovery, and, if it appeared collusive, the execution was staid, till the expiration of his term. Lest tenants should collusively give up their possession to adverse claimants, and dispossess their landlords; landlords are permitted to become defendants in ejectment. And, in any case whatever, when a person bound to indemnify another has had notice that a suit is brought against the person indemnified, for the thing which is the subject of indemnity, it would seem, from the expressions of justice *Buller*, that it is the duty of the indemnifier to step into the place of the indemnified, and become defendant in his room. If he fail to do this, he seems to lose his right of obliging the person indemnified to a rigorous defence of the action, and to become himself liable to all the consequences of his neglect.

1 *Reeve Eng. Law* 132, 167 437. 2 *Reeve* 120, 145, 150, 185.

3 T. Rep. 377.

This seems to be the sensible and just method of performing a warranty or indemnification. It seems to be supported by antient and modern principles. It saves time, costs, and circuity of action, which the law abhors, and it does justice at once. And if, when the ejectment was brought in *Westmoreland* against *Redden*, he or *Castleman* had called on a professional lawyer, to give his opinion on this covenant, in what manner, the warranty ought to be performed, I think, his opinion would have been, that the proper, natural, and legal construction of

1794.

this warranty is, that *Castleman* knowing the witnesses, and the merits of the title, shall take upon him the defence of the action. This is precisely the construction, which the proof shews the parties to have put on it.

Does then this parole agreement of *Castleman's*, to defend any ejectment, annul the written covenant, or defeat it, or enlarge it, or diminish it, or otherwise vary it? I think not. I think this parole proof establishes the covenant, in its legal, natural, and just construction, and gives it a proper force, and honest effect. To exclude this testimony, is only to leave room to impose on the covenant a construction less natural and just, which will produce its effect indirectly and circuitously, and put all parties to greater expence, and which has not more, but rather less, the sanction of legal principles and practice, than the construction put on it by this agreement. Shall we then exclude the testimony? Do the words of the covenant exclude the construction put on them, by this agreement? Or do they necessarily or properly imply, that the warranty shall not operate, unless there were first a recovery against *Redden* in an action, in which *Castleman* should have no concern? I think not.

Therefore, I think, the evidence was properly admitted. Its admission establishes that *Castleman* was bound to defend in the ejectment. If so (as he had notice) the suit was his; and, whatever irregularities there may have been in it, he must abide by them. I even know not, whether, from the opinion of justice *Buller* (and no opinion is more respectable) it may not be fairly inferred, that the result would be the same, had no such parole agreement existed, but only notice of the ejectment, and a call to defend it.

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PENNSYLVANIA v. CHARLES CRAIG, ADAM CRAIG,  
and four others.

THE defendants were indicted for a riot, in beating *William Rowley*. The provocation was, that *Rowley* said, that it was a burlesque on the county, that old Mr. *Craig* (the father of the two *Craigs*, and then lately dead) should be a county commissioner.



It was doubtful whether the evidence affected any but *Charles Craig*; and there was no count for an assault and battery. 1794.

*Ross*, for the defendants, expatiated on the provocation, and stated, that there could be no conviction unless three were guilty. 1 L. Ray. 434.

PRESIDENT. Government is established, to restrain the passions of men, by certain rules. Whether these rules be the best, that might be established, or not; while they exist, they must be presumed the best, or, whether or not, they must be submitted to. We are set, to execute, not to make, laws. Juries are not courts of honour or discretion, at liberty to do as they please, but bound by oath, to judge according to truth, and the rules of the state, that is the laws. According to our laws, no words, however irritating, will justify a battery. Our laws allow force only to repel force.

It is the duty of all men, to preserve the peace: and those citizens, who stand by silently, and see, without endeavouring to prevent or restrain, a breach of the peace, are to blame; and, if the passions of the injured person so far mislead his judgment, as to lead him to consider and prosecute those spectators as parties, their fate is not to be regretted; and though a jury will not, for this only, convict them, yet this passive conduct, and defect of duty, may be construed as an acquiescence in the offence, if not an approbation of it, and a presumption of guilt may be drawn from it, if it be not explained by other circumstances.

To make a man a party to a riot, he must be active, either in doing or countenancing, or supporting, or ready, if necessary, to support the unlawful act. If any one of these persons, with any two others, whether of these or not, committed the unlawful act charged in this indictment, you will convict him or them named in the indictment of this riot. If the unlawful act was done by only one, without any aiding or abetting him, this one, though guilty of an assault and battery, must be acquitted on this indictment for a riot, which is a more aggravated offence.

Verdict—not guilty.

## WILLIAM LEA v. WILLIAM LITTLE.

1794. *LEA* brought an action of debt against *Little*, a justice of the peace, to recover 50*l.* the penalty, for marrying his daughter, a minor under the tuition of her father, contrary to the directions of the supplement to the act intitled An act for preventing clandestine marriages.

1 St. L. 36,  
246.

*Ross*, for the defendant, offered to prove, that *Lea* acquiesced in the marriage, and received the parties into the house afterwards.

*Brackenridge*, for the plaintiff, objected, that this was only submitting to a thing, which he could not prevent; it was an act of humanity and paternal affection; and amounts only to this, that *William Lea* had the sense and kindness not to transfer his resentment against the magistrate, to his daughter and his son-in-law, now irrevocably bound together.

But some favourable circumstances appearing on the part of the justice, and the plaintiff not having served notice before bringing the action, a compromise was recommended and agreed to. The defendant paid the costs, and the plaintiff waved all further claim to the penalty.

1 St. L. 604.  
See the case of  
*Macklin v.*  
*Taylor*, post.  
and of *Huston*  
*v. Ayres*, post.

## WILLIAM M'CLURE v. ROBERT WHITE.

1 St. L. 617. PROCEEDINGS, on what is called the land-lord and tenant law, before two justices of the peace, were removed by *certiorari* into the county court.

*Young* and *H. Ross*, moved to quash the *certiorari*.

ib. 618. 1. Because, under this law, the proceedings can be removed into the court of Common Pleas, only in case of an adverse title.

2. Because this is a summary remedy, which a *certiorari* would altogether defeat; and

1 T. Rep. 83.  
L. Ray 469. 3. Because the *certiorari* ought not to have issued, but on cause shewn.

SEC. 13.  
1 St. L. 618. PRESIDENT. The section in the law, which points out a particular and the only case, of suspending the proceedings of the justices to judgment, relates only to the trial of facts and the right; and does not restrain a superior court, from examining the regularity of the proceedings, after the justices have tried the facts and the right.

PENNSYLVANIA v. ABRAHAM KIRKPATRICK and  
SAMUEL MENOUGH

AN inquisition of a forcible entry and detainer, taken before two justices of the peace in *Allegheny* county, being removed by *certiorari* into the county court,\* instead of traversing the inquisition, and trying it by a jury, 1794.

\* As this case was greatly litigated, before it came into court, it may not be amiss to give a narrative of its progress.

The defendants applied to one of the judges of the court of Common Pleas of *Allegheny* county, for his allowance of a *certiorari*, to remove the proceedings into the county court, and obtained it. The counsel for the prosecution objected to the *certiorari* as irregular, and applied to the judge to supersede it. Some doubts subsisting, the judge sent to me the following case, for my opinion, 30th *January*, 1794.—“Inquisition of a forcible entry and detainer found before justices of the peace. *Certiorari*, at the prayer of the defendant, allowed by a single judge in vacation, as of course, without special cause shewn.

“*Quere* 1. Has a judge, in vacation, authority to allow a *certiorari*, to justices of the peace, in the above case? If so, is it issuable of course, or must special cause be shewn.

“H. H. BRACKENRIDGE, *for prof.*  
“STEEL SEMPLE, *for def.*”

This case was accompanied with the following notes by Mr. Brackenridge.

“A *certiorari* is a writ out of the King’s Bench, which appears to have been grantable only on motion, in open court. Every case respects moving for a *certiorari* or *procedendo* to supersede it. No idea of a *certiorari* having issued from a judge in vacation. This would seem not to have been known to the law, any more than a *mandamus*, or attachment, or other superintending and relieving writ. The power of a judge in vacation, to issue this writ, appears first in the act of 5th and 6th *William and Mary*, since the charter of *Penn.* and, therefore, not a statute of our law. *Queen v. White*, is a case since that statute. Our statute of 13th *April*, 1791, empowering the Supreme court, or a judge of that court, to allow writs of *certiorari*, argues the authority to have been otherwise at common law. *King v. Eaton*, is



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the counsel on both sides, presented the following written agreement to the court, 8th *March*, 1794.

3 *St. L.* 94.

*Penn. Const.*  
v. 3.

2 *Hawk.* 407  
- 3.

4 *Comm.* 316.1 *L. Ray.* 469.580. 2 *L. Ray.*

938, 1452.

1 *Bac.* 349-57.*Doug.* 721.2 *T. Rep.* 89.1 *Burr.* 438.4 *Burr.* 2457-

60, 2522.

decisive, that a *certiorari* ought not to have been granted in vacation, but in open court, and on a ground shewn. But, by our statute, a judge of the Supreme court in vacation, on special ground shewn, can issue a *certiorari* to the sessions of the peace, &c. and by our constitution, the judges of the courts of Common Pleas, have the like powers with the judges of the Supreme court, to issue writs of *certiorari* to the justices of the peace. The court of Quarter Sessions is now one thing, and the justices of the peace another. Therefore the power of the Supreme court, with respect to the justices, remains as it was at common law. Of course, the power of the court of Common Pleas, with respect to them, remains the same: and a *certiorari* to the justices, in their summary jurisdiction, is grantable only by our Supreme court, or court of Common Pleas, on motion, in open court, and not by a judge, in vacation. But, if allowable by a judge in vacation, at all, it must be done on cause shewn. I speak of the case of a *certiorari* prayed for by the defendant, or, on a liberal construction of the principle, by a private prosecutor using the name of the Commonwealth.

"From the whole of the authorities, and the scope of the reasoning in the books, in cases of *certiorari*, it is evident, that a writ of this nature is not grantable of course.

"In the summary jurisdiction of the justices, it would totally defeat the object of the law, as to summary redress, if the inquisition were removeable of course. In all criminal cases, it clearly cannot; and I should conceive, that, in all summary cases of a civil nature, the *certiorari* will be grantable, only to give a revision of the proceedings, and to set aside for want of jurisdiction, or for irregularity.

"It had been an early practice in this country, and, I believe, in the middle counties of *Pennsylvania*, to consider the *certiorari* in a criminal, as well as in a civil case, as issued of course. But in the year 1785 or 1786, I think, at *Chambersburgh*, a decision was formally given, by the judges of the Supreme court, that the *certiorari* was not a writ of course, but obtainable, at the prayer of the defendant, only on motion. The reason is, that otherwise it would be in most cases, used for the purpose of delay."

Such were the notes of Mr. *Brackenridge*. I would observe, that the expressions of justice *Buller*, in one of the cases cited, may render it questionable, whether a single judge of the court of King's Bench in *England*, had autho-

"Agreed, that a verdict for the Commonwealth be entered, on this inquest, subject to the opinion of the court on the following case.

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rity to issue writs of *certiorari*, before the act 5 and 6, *W*, 5. *W*, 5. *M*, § 5.

The act for establishing courts of judicature in this province, gave the judges of the Supreme court all the authority of judges of the King's Bench, Common Pleas, and Exchequer, in *England*; it therefore gave them all the authority, which the stat. 5. 6. *W*. and *M*. had before given to the judges of the King's Bench; and besides, it expressly gave authority, to issue writs of *certiorari*, &c.

The judges of the Supreme court, then, probably issued writs of *certiorari* to justices of the peace, acting specially, in the same manner, as to inferior courts; and the seventh section of the act to establish the judicial courts of this Commonwealth, is but a recognition of what their practice was before that act.

Until the present constitution, the county courts were composed of justices of the peace, and had no power to send a *certiorari* to any justice acting individually. This power was in the judges of the Supreme court only.

When the Convention of 1789 was new modelling, the county courts, and establishing them on a more respectable footing, it was proposed to give them jurisdiction in capital cases. But that a prisoner, to be tried for his life, might have the benefit of the most enlightened tribunal in the state, it was proposed, "that the parties accused, as well as the Commonwealth, may remove the indictment and proceedings into the Supreme court at any time before trial." An amendment of this proposition was introduced, substituting, instead of the words "at any time before trial," the following provision; "but no writ of removal, presented by the party accused, shall be allowed by the court, where the indictment shall have been found without the consent of the attorney general, or special cause shown, unless the same shall have been specially awarded by the Supreme court, or one of the justices thereof." This amendment was almost unanimously rejected by the convention; because it altogether superseded the provision of removal into the Supreme court, by the party accused, and left the jurisdiction in the county courts, the same, as if no such provision had been made; for, if nothing had been said of removal, the law and practice, as it stood before, would have secured a removal on

1 St. L. 171, § 13.

§ 11.

3 St. L. 94.

Journals of Convention, 17th February 1790. p. 104-5.

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*Alexander Fowler*, the prosecutor, being seized of the premises mentioned in the inquisition, and in actual possession of the same, judgments were entered against

the terms proposed by this amendment; and because it was the intention of the convention, while they gave to the county courts jurisdiction in capital cases, to annex, to this jurisdiction, a condition of enlarging the power of removal, by defendants, into the Supreme court. The matter stood thus in the convention; it was thought proper, to give the jurisdiction, but not without extending, as far as possible, the power of removal, by the persons accused; when it was proposed, that the provision for removal should be, "that the parties accused, as well as the Commonwealth, may, *under such regulations, as shall be prescribed by law*, remove the indictment and proceedings into the Supreme court." This proposition was adopted. But when, in conformity to this provision of the constitution, the legislature proceeded to prescribe regulations for the removal, by parties accused, of indictments and proceedings into the Supreme court; they prescribed this regulation, that "*the certiorari shall be specially allowed by the Supreme court, or one of the justices thereof, upon sufficient cause to it or him shown, or shall have been sued out with the consent of the attorney general.*" This regulation, like the amendment first proposed, and almost unanimously rejected in the convention, added no new privilege to the parties accused, established the regulation, which the convention had rejected, entirely defeated the provision for the removal, and left the jurisdiction in the county courts, as if no provision for removal had been made, and it rested only on the law and practice in the courts of *England*, and in the Supreme court, which had the same authority and rules.

3 St. L. 94.

The constitution gives to the judges of the courts of Common Pleas, within their respective counties, like powers with the judges of the Supreme court, to issue writs of *certiorari* to the justices of the peace, and to cause their proceedings to be brought before them, and the like right and justice to be done. Therefore judges of the county courts of Common Pleas here may, within their counties, issue writs of *certiorari*, as judges of the King's Bench in *England* could do.

Now in *England*, the king has a right to demand a *certiorari*, and it cannot be refused him. A private prosecutor, borrowing, as he must, the name of the king, for a prosecution, in which the king takes no interest, has a *certiorari*

4 Burr. 2457.

2 T. Rep. 89,

90.

2 Hawk. 407.



him, upon which executions issued, the premises were seized, condemned, and sold by the present sheriff, and a deed was executed by him to *Abraham Kirkpatrick*, 1794.

of course, unless cause be shewn against it. But a defendant cannot have a *certiorari*, unless he first shew cause for it.

Any *certiorari*, issuing for a defendant, without special cause shewn, is irregular, and will be set aside.

My opinion on the above case was transmitted to the judge as follows.

The authority of the judges of the courts of Common Pleas, to issue writs of *certiorari* to justices of the peace, is derived from the 8th section of the 5th article of the constitution, which gives them the like powers with the judges of the Supreme court. The judges of the Supreme court had the like powers with the judges of the court of King's Bench; which court had a general superintendence over all inferior jurisdictions. Therefore, if we can discover what were the regulations, under which writs of *certiorari* were issued by the judges of the King's Bench, we shall, of course, know the regulations for issuing them by the judges of the Supreme court, and the judges of the courts of Common Pleas; for they will be the same.

Comparing the expressions of justice *Buller*, with the provision of the act of Parliament 5, 6, *W. and M.* it does appear probable, that, before that act, writs of *certiorari*, for the defendant, were not granted but by the court in term time. <sup>2 T. Rep. 90. c. 11 §. 5. 2 Hawk. 409.</sup>

Yet there is an inconvenience in this: and the clause in the 7th section of the judiciary law, which relates to writs of *certiorari* being allowed by one judge of the Supreme court, is not so much the introduction of new law, as a recognition of former law or established practice; and seems to be the same as that given by the act of parliament to the judges of the court of King's Bench, and by the act of assembly vested, with the other powers of the judges of the court of King's Bench, in the judges of the Supreme court; and the 11th section of this act of assembly expressly gives any one judge of the Supreme court power to issue writs of *certiorari*. So that the 7th section of the act of 1791, gave no new powers to the judges of the Supreme court; and their powers being the same with those of the judges of the court of King's Bench in *England*, it is probable, that their practice was also the same. And it is probable, that, respecting writs of *certiorari* directed to justices acting speci- <sup>3 St. L. 94. 1 St. L. 171, 180, 179.</sup>

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the purchaser and one of the defendants, (prout judgment, execution, and deed). The sheriff, after the acknowledgment of the deed, went to the premises with *Abraham Kirkpatrick*, *Samuel Menough*, and others, broke open the door of the mill, in which there was no person, and gave possession of the mill to *Abraham Kirkpatrick*, who left *Samuel Menough* in possession for him, as his tenant. *Alexander Fowler* entered, and forcibly turned *Samuel Menough* out of the mill, and held the possession.

ally, they adopted the same rules, as respecting those writs directed to justices as a court of Quarter Sessions. At least I know not the contrary.

But it seems to be settled, that a *certiorari* on the part of the defendant, and without the direction or consent of the attorney-general, is never granted, but on cause shewn, and established by *affidavit*. And, if granted otherwise, it seems to be always set aside. And, in the case of a forcible entry and detainer, I think the cause shewn ought to be good, and clearly made out; as the *certiorari* prayed for is to delay the execution of a statute, intended as a summary and specific relief against an act of violence; and, if the case require it, all equitable terms ought to be laid on the defendant.

The above opinion, transmitted by me to the judge, being against the *certiorari*, as issued, the counsel for the defendant, as Mr. *Brackenridge* stated to me, attempted to support it by procuring the consent of the attorney for the state. "This," says Mr. *Brackenridge*, "I conceive could not help it.

"1. Because the consent was not given before the issuing, and so the writ did not issue by consent, but without consent.

4 Burr. 2438. "2. Because, it being the case of a private prosecutor, the attorney had no right to interfere.

2 Str. 717, and "The law is clear, that the attorney cannot demand a *certiorari* for the prosecutor; and why, without his consent, by analogy, see *Rex v. Hales* allow one to the defendant. It strikes me as unreasonable, 2 Str. 816 and that, as the prerogative or power of the attorney, to assist *Rex v. Elford* a private prosecutor, is taken away, it should exist, to injure him. However, the business was set right, at last, by obtaining a new writ, on affidavit filed, and conditions imposed." 2 Str. 877.

*Rex v. Farewell*, But it seems to have been determined that a prosecutor is not bound to make affidavit or enter into recognisance, 2 Str. 1209. 6 T. Rep. 197.

The sheriff, after this, returned to the premises, together with *Abraham Kirkpatrick*, *Samuel Menough*, and others, who attended the sheriff, by his order; and, with force and arms, broke the dwelling house of *Alexander Fowler* on the premises, entered, and forcibly put him out, and gave possession of the house to *Abraham Kirkpatrick*. Whilst the sheriff was breaking the house, *Abraham Kirkpatrick* and others, who came with the sheriff, went into the mill, the door of which was open, took possession, and held it with force, and still does hold, against the said *Alexander*, the house, and mill, and premises, then sold and delivered to him. If the court is of opinion, &c. then, &c. This case not to bar any exceptions to the form and regularity or effect of the proceedings previous to the settlement of this case.

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“H. H. BRACKENRIDGE, for prof.

“JAMES ROSS, for def.”

This case was argued by *Brackenridge* and *Young*, for the prosecutor, and by *Ross*, for the defendants.

*Brackenridge*. The question is, whether, on an execution, and sale of land, under the act of assembly, the sheriff can give possession to the purchaser. <sup>1 St. L. 67.</sup>

Estates could not be aliened, at discretion by the owner, because his heirs and the public had an interest; and therefore lands were not made subject to debts, but after long time, and under great restrictions. Estates less than freehold were less favoured, and less in proportion as they approached the nature of chattels. Estates for years, or chattels real, may be taken in execution. To encumber land, certain solemnities were prescribed.

On the sale of a term on a *fieri facias*, possession cannot be given; nor, to execute a *fieri facias*, can doors be broken; therefore no possession can be given. If the sheriff sell a lease, he cannot turn the tenant out of possession, but the vendee must bring an ejectment. At the suit of the king, or on a *habere facias possessionem*, the sheriff may break open doors. A person having a right of entry may enter *peaceably*, and, being in possession, may retain it, and plead his right. *Buller*, justice, inclines to think, the sheriff may turn out the person against whom the judgment is. But he speaks cautiously, which implies, there never had been an instance of it, and he

<sup>2 Comm. 287.</sup>  
<sup>290, 140.</sup>  
<sup>3 Comm. 417.</sup>  
<sup>Stat. 11 & 13</sup>  
<sup>Edw. 1.</sup>  
<sup>27, Edw. 1.</sup>

<sup>3 Comm. 417.</sup>  
<sup>2 Bac. 351.</sup>  
<sup>3 7.</sup>  
<sup>2 Sborwer 85.</sup>

<sup>3 T. Rep. 293.</sup>



1794. rather seems to express what the law ought to be, than what it is. This is a mere speculative opinion, and in the case of a lease, *Kenyon*, chief justice, says, under an *elegit*, the sheriff could not deliver the land. The statute giving the *elegit*, says the sheriff shall deliver. The act of assembly, for taking lands in execution, directs, that where it extends, the sheriff shall deliver as upon writs of *elegit*. The act surely does not mean more, where, as on a *fieri facias*, all property is devoted. There is good reason, that possession should not be given under such a writ, without farther enquiry. The sheriff levies an indefinite tract of land, without metes, &c. It is proper, that there should be an ejectment, to examine all the circumstances, and ascertain the specific quantity sold, and then a writ will issue, ordering the sheriff to give possession, as the former execution ordered him to sell.

1 St. L. 68.

But, be the reason of the law what it may, the law has been, that no possession can be given on a *fieri facias*. No instance has ever been of such possession given. Hence a strong presumption, that none can be given.

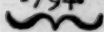
*Refs*, for the defendants. It is true, by the common law, grounded on feudal principles, a judgment could not affect lands. They were a benefice for military service, the common tie between lord and tenant; and no alienation could be permitted, lest an enemy should be made tenant. Even a son must be admitted by the lord, before he could enjoy the possession of his father. As military tenures were slackened, and commerce increased, the necessity of subjecting lands to debts became evident.

*Cowp.* 1.

2 Bac. 358.

The privilege of a house has been unreasonably extended, and is to be taken strictly. Does the same privilege extend to houses and lands, when they themselves become subjects of execution? Chattels only were liable to debts; because the debt was but a chattel.—Land was not liable, because it was the means of procuring military service, and defence of the kingdom. Afterwards commerce subjected lands to debts. The difference is as great between our situation and system of property, and that of *England*, at the time of the decisions cited against me, as between the situation of *England* then, and its situation before land could be sold at

all. When the law gives the end, it must give all the means necessary to accomplish it. When land is subjected to execution, it must be seized by the sheriff, in the same manner as chattels may be seized; for otherwise the power of seizing would be nugatory. Our act of assembly made lands liable to execution. This makes them chattels for the payment of debts; and they have always been so considered.

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On *clegit*, the sheriff is to deliver to the creditor, but half of the land. The sheriff cannot turn the debtor out of his own share: it is an undivided moiety. The sheriff holds an inquisition; afterwards, a *liberate* issues. Our execution enables the sheriff to seize land. And, from this time, he continues constructively in possession. His entry and possession are lawful, and even by the command of the law.

The description of the land indorsed on the *fieri facias*, and inserted in the advertisement of sale, and in the deed, is more specific, than the description in ejectment. And the tenant may, at any time during the proceeding to sale, or before the execution and acknowledgment of the deed to the purchaser, come in and make his objections.

As in the case of a recovery or fine, all the parts make but one whole title, and have a mutual relation: so the *fieri facias*, the seizure, and the *venditioni exponas*, the sale, and the deed, make but one: and the sheriff is supposed to be always in possession. The act of assembly enables the sheriff to give a deed vesting in the purchaser all the debtor's title, at the time of the judgment. I contend, the sheriff, under the *fieri facias*, may turn out any tenant of the debtor, whose title accrues subsequent to the judgment.

It is not material here, whether the sheriff can break open the door, to take chattels out of the house. For here he may take the house itself. This is a case different from the other of which the *English* books speak.—Why enable a sheriff to take a *horse* by force, and not a *house*?

Though the sheriff be not strictly justifiable in breaking doors, to make execution, yet, if he do it, the execution is good; and the party is turned round to his remedy against the sheriff.

5 Co. 93.

4 Bac. 454.

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The case in *Showers* is quoted in *Taylor v. Cole* ; and yet justice *Buller*, is of opinion, that the sheriff may give possession.

2*Show.* 85.3*T.Rep.* 298.

*Young*, for the prosecutor. In construing statutes, we must consider, 1, what the common law was before ;— 2, what was the mischief intended to be remedied ; 3, what the remedy is ; and 4, what is the reason of that remedy.

1*St.L.* 12.

Our act of assembly makes lands liable to sale, and gives a clear estate in them to the purchaser ; but no authority to give possession ; no *liberate*, which in *England* is necessary to give goods to the creditor. Many estates have been sold, without the knowledge of the debtor. The acts of assembly give the sheriff no possession ; only authority to sell, with a power to enter on the land, to ascertain it. Having sold, the sheriff is *functus officio*. Statutes are to be construed according to the reasons of the common law. Judges are not legislators.

1*Str.* 45, 358.1*St.L.* 68.

Land is to be delivered as on writs of *elegit* in *England*. No property can be delivered without a *liberate*. The acts give no authority to the sheriff to give possession, therefore he cannot do it, however right it might be.— Courts cannot exceed their authority ; much less can ministerial officers. No fees are mentioned for this service, in the table of fees. The laws, rendering lands subject to execution for debts, make not lands chattels, but assets. In *elegit*, it is not an undivided moiety, that is delivered ; but a moiety by metes and bounds. I have known ejectments brought on a *liberari facias*.

*Doug.* 456.

The whole proceeding, the levy, the sale, and the deed, is but a conveyance, and operates as nothing more. It transfers the right, as if the owner himself had made the conveyance. The law gives the sheriff authority to seize, levy, and sell. He has no possession, and therefore can give none ; for he can give no more than he had. He had no right to take possession ; for, if he had, he might, at the seizure, have turned *A. Fowler* out of doors, and occupied and enjoyed the premises : for that only makes possession. Entry makes seisin, and enables to convey ; but makes not possession. The sheriff, therefore, conveys the right, but does not surrender the possession. That, if detained, must be obtained, with damages for the detention, by a direct suit, when possession will be the object.

3*Comm.* 173

=4.



At *June* term, 1794, the opinion of the court was delivered.

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PRESIDENT. An inquisition of forcible entry and detainer, taken before two justices of the peace, having been removed, by *certiorari*, into this court, at the last term, the counsel for the parties presented the following case for our opinion.

"Agreed, that a verdict," &c. *ante* p. 195.

The question in fact is, whether a sheriff, on a sale of lands taken in execution on a judgment, under the act of assembly is authorised to turn out the defendant possessor by force, and put the purchaser in possession.

There are some circumstances in the present case, different from the mere abstract question. But, in the argument, no stress was laid on them, and, perhaps, it may not be necessary to rely on them in making up our opinion. The abstract question only was considered then : perhaps the abstract question only need be considered now.

The argument for the prosecutor relied strongly on the unalienable quality of lands at common law, and the great hesitation, with which statutes submitted them to debts ; and stating, that all statutes, in derogation of the principles of the common law, are liable to a strict construction, concluded, that our acts of assembly, which gave authority to sheriffs to sell lands, enabled them only to convey the right, not to change the possession ; and that, to suppose the contrary, would authorise the sheriff, immediately on receiving the *feri facias*, to turn the debtor out of possession, and to occupy the land himself, and receive the profits, till the time of the sale. But, as the act of assembly does not authorise the sheriff to do this, before the sale, he cannot do it after, for then his authority ceases ; and the purchaser, like every other owner out of possession, must acquire it in a peaceable manner, or compel it by a direct suit, when that and damages will be obtained by an execution for that purpose. It is settled, that a sheriff cannot break open an outer door, to execute a *feri facias* : how then can he give possession of a house ? Though a term, being a chattel, may be sold on a *feri facias* ; or a moiety of land delivered on an *elegit*, yet, in neither case, can the sheriff give possession. The purchaser and the creditor must ob-

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3 *T. Rep.* 298.

ib. 295.

Against these arguments for the prosecutor, the counsel for the defendants contended, that the unalienable quality of lands, at common law, proceeded from the peculiar nature of feudal tenures, being considered as a benefice for military service. But these principles have gradually given way to the progress of commerce: and our acts of assembly, subjecting lands to execution and sale for debt, completely reduces them to the state of chattels; and, if they may be seized as chattels, it follows, that they may be seized by force. The whole proceeding, the *feri facias*, the seizure, the inquisition, the *venditioni exponas*, the sale, and the deed, are, as in the case of a fine or recovery, to be considered as one transaction; and the sheriff to be considered as in possession from the seizure. The proceedings give sufficient notice, and opportunity of defence, to all parties concerned. It is not material, whether, in *England*, the sheriff can break open the door of a house, to seize chattels; for, here, he may seize the house itself. And, there, the irregularity of breaking the door does not avoid the execution, it only subjects the sheriff to an action of trespass. The case in *Show*, which lays it down, that, on the sale of a term, the sheriff cannot turn out the tenant, but the vendee must bring an ejectment, was cited in the case of *Taylor v. Cole*, and yet there justice *Buller* gives it as his opinion, that the sheriff might turn out the tenant.

2 *Show.* 85.

3 *T. Rep.* 298.

Such seems to me the material substance of the arguments in this case. They were ample and well directed. No decision has been discovered, to justify the power exercised by the sheriff, on this occasion. What then shall we say? Has an attempt been made, in this case, which was never made before? Or has it often been made, and found so palpably justifiable as never to have been called in question? This cannot be, for there is a decision against it. I am inclined to believe, therefore, that the attempt has been seldom made; and is now defended, not by any precedent, but on the authority of justice *Buller*; on the terms or intent of our acts of assembly, for taking lands in execution for payment of debts; and on the principles of general convenience.

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2 *Show.* 85.

151. L. 12, 67.

I. If accuracy of judgment, and knowledge of the subject, can give weight to an opinion, there are few, if any, whose opinions are entitled to more respect, than those of justice *Buller*. The case, in which his opinion was given, differs essentially from the case before us.— I speak of the case of *Taylor v. Cole*, as it appears in *Term Reports*, and in *H. Blackstone's Reports*. That was an action of trespass against a sheriff. In that case, the entry of the sheriff was lawful and peaceable, and there was no expulsion by the sheriff. His entry was lawful, by virtue of a *feri facias*, to be executed on the house; and the jury acquitted him of both the force and the expulsion. This is an entry and expulsion made with force. That case was a civil action. This case is a criminal proceeding. Though the case of *Taylor and Cole*, arose on a sheriff's sale; yet there is nothing in the manner in which the court examine it, to justify an idea, that a forcible expulsion, by virtue of a sheriff's sale, is not within the statutes of forcible entry and detainer; but rather that it is within those statutes. The chief justice, without distinguishing in favour of sheriff's sales, states generally, that the case then before the court, was an action of trespass, in which a person having a right and having peaceably exerted it, may plead, that the land on which he entered was his own; but if he assert that right by force, it becomes the subject of a criminal prosecution, which was the case in *Showers*, a proceeding under the statute for a forcible entry. If this case in *Showers*, which lays it down, that the sheriff, having sold

3 *T. Rep.* 292.*H. Bla.* 555.*Rex v. Deane,*  
*et al.* 2 *Show.*  
85.



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a term, on a *feri facias*, cannot, and must not, put the person out of possession, and the vendee in; but the vendee must bring his ejectment, had not been considered, by the chief justice, as applicable to a tenant in possession defendant, and as good law; why should he have given himself the trouble of distinguishing that case from the case before him, in these points, that the entry in the one case was peaceable, in the other forcible, and that the one was a civil action, the other a criminal prosecution. *Buller*, after expressing the inclination of his thought, on a mere speculative point, not within the case before him, declares, that he gives no opinion.—*Kenyon*, at the same time, seems to recognize the case in *Shower*, and that case is contrary to the inclination of *Buller's* thoughts. The case in *Shower* seems to be recognized by the general current of *English* law authorities; and, supposing a term and a fee, in this respect, similar, is the case before us. Whether, therefore, are we to take for law the solitary, extra-judicial, unpremeditated, and unrelayed on, opinion of a single, though highly respectable, judge; or a decided case, countenanced by the general weight of authority, and introduced into all the subsequent systems, as an established point of law? No doubt, the defendants, coming with the sheriff at his request, are exactly in his situation, and, if he be justifiable, they are. If a sheriff has authority to give possession, he must have authority to do it by force. The case in *Shower* says, he has no such authority.

If the suggestion of justice *Buller* can be reconciled with the case in *Shower*, it will be a more respectful attempt to reconcile them, than to set them in opposition. Both the case in *Shower*, and the case before us, are of a sheriff's giving possession after a sale. Justice *Buller* says, that the sheriff, having sold is *functus officio*: can this mean any thing, but that his authority over the premises is expired? I should pay but a poor compliment to the judgment of justice *Buller*, to consider him as saying, that a sheriff has authority to act, after he has said, that his authority is expired. He does not say, that a sheriff *functus officio* can turn out a tenant by force, nor that a purchaser at sheriff's sale can turn out a tenant by force (I suppose always the tenant to be the de-

sendant in the judgment); and unless he says one or other of these, he comes not up to the case before us. He certainly would appear more consistent with himself, if we consider the authority he attributes to the sheriff, of turning out the tenant, as exerted, at the time of the seizure under the *feri facias*, than as exerted after the sale. Let us see whether there be not something in the method of proceeding in *England* to the sale of a term, that will render this construction of justice *Buller's* opinion more probable, than it would be, if it were to be applied to the method of proceeding to the sale of a fee simple estate under our act of assembly. In *England*, a term is sold, because it is a chattel. Immediately after receiving the *feri facias*, the sheriff may seize the term, and, without delay, proceed to sell it, as he would proceed to sell goods. The distance of time, between the seizure and sale, may be so inconsiderable, that it is almost the same thing to the tenant, whether he is turned out at the seizure, or at the sale. In *Pennsylvania*, the sheriff, having received a *feri facias*, and seised lands, must summon an inquest, and return the whole proceedings to the next court; and cannot proceed to sell, till, after this return, he has received a *venditioni exponas*; and, instead of several days, several months, must intervene between the seizure and the sale. It might be probable, therefore, that justice *Buller* would say, turn out the tenant, at the seizure; when, if between that and the sale, such time intervened, as in *Pennsylvania* intervenes, he would not have said so: when perhaps the seizure might be just before harvest, and the crop to be then severed might go far to pay the debt.

In *England*, nothing but chattels can be seised on a *feri facias*. It has been held, that a bargain of sale of chattels is incomplete, without delivery. Any assignment of chattels, unless possession accompany it, is, as against third persons interested, held fraudulent and void; because possession remaining in the assignor, gives him a false credit, and enables him to impose upon others.—This is not the case with respect to land; for possession of it is not considered as evidence of right or title in it: this depends on the deeds, by which it is transferred from one to another. But as leases of land are considered as chattels, they have, in this respect, been subjected to the

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*Bullfr. 213.**2 T. Rep. 591*

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*1 Wils. 44.**1 L. Ray 251.**1 Wils. 44.**Reed v. Har-**rison, 2 Bla.*

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regulations of other chattels; and a conveyance of a lease for years, unattended with possession, has been held fraudulent. Considering a seizure in execution, as but a form of assignment, the same principles, for the prevention of fraud, have been applied to chattels taken in execution, and left in the possession of the owner: for these have been considered as subject to a second execution, at the suit of another person. It appears, therefore, that it must be usual in *England*, for sheriffs to take possession of the chattels, which they seize in execution, or to leave some person in possession of them, in their name.

To me these circumstances appear to add considerable weight to the construction, which I have suggested, of the inclination of justice *Buller's* thoughts on the power of a sheriff, to turn out the tenant of a lease. But neither these circumstances, nor this construction will justify the defendants in the present case. If the meaning of justice *Buller* was, that the sheriff, who could turn out a tenant, must be one not *functus officio*, the sheriff must turn out the tenant at the time of the seizure, or before the sale. If the turning out of the tenant be necessary, to prevent his possession from being evidence of fraud, in the case of a lease; that is not necessary in the case of a fee-simple. And, although this manner of turning out a tenant of a lease, which could be sold with all the summary diligence of a chattel, might be little or no inconvenience; yet this manner of turning out a tenant in fee-simple, the sale of whose interest must proceed with all the slow solemnity of our act of assembly, might be a great inconvenience.

2. If, therefore, the weight of justice *Buller's* opinion will not justify the present defendants, they must resort to the second point; the terms and intent of our acts of assembly, for seizing in execution, and selling real estates.

*1 St. L. 12.*

The first act provides, to the end that no creditors be defrauded of the just debts, due to them by persons who have sufficient real estates, if not personal, to satisfy the same; that all lands and houses shall be liable to sale on judgment and execution, under certain regulations; and the sheriff shall sell and convey the same, under his hand and seal. After which, such lands and houses shall be and remain a free and clear estate to the purchaser,



his heirs and assigns, as fully as they were to the debtor. The second act, with the same end in view, provides, that lands shall be liable to be *seized* and sold, upon judgment and execution obtained. The sheriff is directed to give the buyer a deed duly acknowledged in court. If the profits of the lands will, in seven years, pay the debt, the lands shall be *delivered* to the creditor, until the debt be levied by a reasonable extent, in the same manner, as lands are delivered on writs of *elegit* in *England*. If the profits be not sufficient, in seven years, to pay the debt, a *venditioni exponas* issues, empowering the sheriff to sell. And all other lands are to be *seized and taken* by a writ of *levari facias*, and sold, either with or without a *venditioni exponas* : or, if no buyer appear, are to be *delivered*, on a *liberari facias*, at the valuation of twelve men, to the creditor, as his free tenement.— The persons, to whom the lands are thus sold or delivered, their heirs and assigns, shall hold them, as fully, and for such estate, as the debtor did or might do, before the taking thereof in execution.

In this, I can see nothing provided for, but the sale of lands for the payment of debts. And, as it is compulsory, the sheriff is made the organ of conveyance, instead of the owner. His whole proceeding is a legal conveyance, and, like any other legal conveyance, transfers, to the purchaser, all the estate of him, for whose debt it was sold. But there is nothing in this act, which says, that the purchaser from the sheriff is to obtain possession in any other way, than a purchaser from the owner, peaceably or by consent.

It may be said, that the direction to the sheriff to *seize*, and, in some cases, to *deliver*, implies an authority to turn out the possessor, and put the purchaser in possession. But let it be remembered, that this seizure, if it mean a turning out of the owner, is when the execution is laid on the land, and before the sale ; and that, even when the sheriff has seized, he is to deliver to the creditor, in the same manner as lands are delivered on writs of *elegit* in *England* ; which seems to be little more, than a sheriff's deed *sub modo*, or an authority to enter ; and, on this delivery, the creditor must bring an ejectment.

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1st L. 67.

*Taylor v. Abington, Doug.*  
456.  
4 *Mod.* 48.  
1 *Crompt.*  
*Pract.* 363.

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Let us bear in mind, that our act of assembly was about to make a very material change in the principles of common law, and to declare, that lands should be sold for the payment of debts. The assembly knew, that, by the principles then governing real estates, lands could not be sold ; and they knew that leases could be sold ; yet they did not declare, that lands should be sold in the same manner as leases. The assembly knew, that on a *feri facias* against a tenant of a lease, a sheriff could not turn this tenant out of possession, and put the vendee in ; or, at least, they did not know, that he could ; for no instance of the kind had ever been known to have happened, or if it happened, it had been judicially condemned ; and yet they did not declare, that he should have this power, nor prescribe the manner in which it should be exercised. Can we suppose, that they would not have done so, if they had intended to do it ? It is said, that, by subjecting lands to be sold for debts, they made them chattels. This is a loose way of speaking. It is plain, that they did not make them saleable as chattels ; for they have prescribed a particular manner of proceeding. And though this manner is prescribed at considerable length, and with sufficient minuteness, not a word is said of the sheriff's giving possession. If, independent of giving possession, there was a new object of sufficient importance provided for by this legislative act ; I cannot, from any thing, which they have said, infer a new authority of giving possession : nor do I think myself warranted to supply their silence. Without supposing a new power of giving possession, of which nothing is said, there was a new object, of sufficient importance, provided for by this legislative act, an assignment or conveyance, under certain qualifications, of the right of the whole lands of a debtor. As, before this act of assembly, a creditor had a right to the enjoyment of half the lands of a debtor, until, out of this enjoyment, he should be paid. So, in the manner pointed out by the act of assembly, he could acquire a right to the enjoyment of the whole of his debtor's land forever. But to enter on this enjoyment, and unite possession to his right, no new method is pointed out. What then is a court of law to infer, but that he must pursue that method, for this enlarged remedy, which, before, he could

pursue for an inferior one, and prosecuting this, like any other, right of land, bring an ejectment.

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3. Of the principles of *English* law, I know nothing so favourable to the present defendants, as the inclination of justice *Buller's* opinion, so much relied on. But if, on the principles of *English* law, and on the construction of our acts of assembly, the defendants are not justifiable, I know not to what principles we shall resort, on the ground of general convenience. On the subject of the present discussion, all the relaxations of common law severity have been made by the legislature. The legislature of this state have applied their attention to this subject, and, greatly to their honour, extended it beyond the narrow limits, to which it had been confined. We find nothing in the solemn act of this extension, which can inform us, that they intended to go farther than a transference of a right. Shall we, on a subject on which they have expressed their mind, take upon us to declare, that they intended to go farther, than their expression bears?

That an honest man, who, for a full price, purchases, at public sale, a tract of land, should, afterwards, find himself involved in a law-suit, to obtain the benefit of his purchase, is indeed an evil, which requires redress. But the legislature, with this evil under their contemplation, did not redress it. Will it be presumed, that, because they did not, we must? As the evil was known to exist in *Pennsylvania*, unremedied, either by the legislature, or by courts of justice, it is to be presumed, that purchasers at sheriff's sales reckoned upon it in their bargain, and diminished their price, in proportion to the trouble they expected to meet with, in obtaining possession. Where this is the case, the real loss generally falls, where it ought to fall, on the obstinate owner, who continues in possession, after his right has ceased. Whether this has been the case, in the present instance, or not, is no reason for us to assume an authority, which is not given to us, and authorize a sheriff to do that, which law has not authorized him to do. It is better that an individual suffer, than that a general line of duty be broken through. It is better, that the evil exist, for some little time (I hope it will be but a little time)



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longer, than that its correction should come from an improper source. Great inconvenience would ensue, if the tenant were turned out at the seizure, under the *fieri facias*: and, to turn him out after the sale, appears to me to want the solemnity of judicial authority. The owner of chattels may seize them at any time: but the law has restricted the owner of land to a peaceable seizure. Great inconvenience might follow from a loose unguarded authority of turning out by force, perhaps instantaneously. Some precautions must be adopted for the due exercise of this power. None have yet been laid down by courts; for the exercise of it was never, that I have heard of, within their contemplation. To sanction it, without previous precaution, appears dangerous. When the legislature shall take the subject into consideration, they can lay down rules for proceeding in it. Until then, we believe, the evil must be suffered to exist, or find its remedy in the prudence of the parties. This is not an action of trespass, where right would justify the entry, and the taking and detaining of the possession. It is an indictment for a forcible entry into lands, and expulsion of the tenant, when there was no direct legal warrant for making the expulsion. This is an offence punishable by indictment. There must therefore be judgment for the Commonwealth; and restitution must be awarded.

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## WESTMORELAND COUNTY,

March Term, 1794.

JACOB MACKLIN *v.* ROBERT TAYLOR.

*See the case of*  
*Lea v. Little,*  
*ante p. 192,*  
*and of Huston*  
*v. Ayres, post.*  
*1 St. L. 36.*  
*246. 1 St. L.*  
*604.*

**T**HE defendant, a justice of the peace, having, without the consent of the plaintiff, her father, married his daughter to *Enoch Varnum*; the plaintiff brought an action of debt, on the act of assembly for the penalty of 50*l.* The writ was returnable to *March* term, 1793. Written notice of the action to the justice was proved.

The daughter and *Varnum* came to *Taylor's* house, a little after midnight, on *Monday* morning, in *December* 1792, and were there married by him. She was then sixteen years and a half old, and lived in her father's house. *Taylor* asked them why they had not her father's consent. They said, they were in such circumstances, that it was not proper to have made public.

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*Ross*, for the defendant, offered to prove, that the girl told the justice, that she was pregnant, and that *Varnum* was father of the child with which she was pregnant, and that her pregnancy could no longer be concealed, and to prove, that, in such cases, the constant practice had been for justices to marry the parties.

PRESIDENT. The testimony is altogether impertinent, and ought not to be admitted. These circumstances are proper for the consideration of the father; and, no doubt, would always be duly weighed by him. But to suffer them to be given in evidence, as a justification of the justice, would be transferring to justices, that parental control over young women, which policy and nature have reserved to parents. As to the practice, it, being clearly unlawful, can be no justification.

*Ross*, then contended, that, by analogy to the case of suits by husbands against other men, for criminal conversation with their wives, and, *a fortiori*, this being a penal action, it must be proved by the prosecutor, that his daughter is legitimate, or he must be nonsuited.

*Young*, for the plaintiff, read 3 *Bla. Comm.* 139, 140. No body doubts of the marriage of the parents of this woman. But we will not offer proof, that is not necessary.

PRESIDENT. The analogy stated by Mr. *Ross*, is incomplete. There is no legal tie between a man and a woman cohabiting without marriage; and he has no more legal right to sleep with her, than any other man, who may procure her consent. Their cohabitation is an offence; and, from this offence he shall derive no rights or profit. But though the begetting of a bastard daughter be an offence, the maintenance, education, and protection of her is a duty; and the rights arising from this duty ought not to be curtailed. Common sense requires this, with a force that there is no legal distinc-

1794. tion to resist. And if the putative or natural father can be comprehended within the word *parent*, which is the word used by this act of assembly, he ought to be intitled to the penalty for this offence. We think he may be so comprehended. And I will state an analogy more accurate, and justifying our opinion. The act of parliament, to prevent the carrying away and marrying young women without consent of their parents, or those who have the keeping of them, imposes a punishment by fine or imprisonment. And on this act, the court of King's Bench granted an information for taking away a natural daughter, under the care of her putative father. So the case of illegitimate children has been held to be within the mischiefs to be remedied by the *English* marriage act. We therefore hold, that it is unnecessary to prove the marriage of the parents, or the legitimacy of the daughter; but if Mr. *Ross* desire it, we will reserve the point, that he may, if he please, argue it again.

1 St. L. 217.  
4 5. P. 3.  
M. c. 8.  
4 Comm. 208.  
4 Reeve 491-2  
Rex v. Cornforth, et al.  
2 Str. 1162.  
Rex v. Hodnett, 1 T. Rep. 96.

*Ross* then argued to the jury, that, when fathers withhold their consent unreasonably, juries ought to weigh the case, and might give less than 50*l*.

PRESIDENT. If parents are unreasonable, the law provides a method of marrying without their consent, viz. according to the forms of their church. If juries can give less, they may give more, than 50*l*.; but to give either less or more, would be making a new law, which neither courts nor juries can do. There is no doubt in this case; and the verdict must be for the plaintiff for 50*l*. precisely.

The jury found for the plaintiff 50*l*. debt with 6*d* damages and 6*d*. costs.

No motion was made to set this verdict aside; and, at another term, there was judgment on it.



## ALLEGHENY COUNTY,

June Term, 1794.

GEORGE BOWERS v. EDWARD FITZRANDOLPH.

**BOWERS** brought an action of *trespass vi et armis*, against *Fitzrandolph*, for killing his dog. The dog had bit *Fitzrandolph*, who, a few minutes after, seeing the dog again, shot him. There was also some slight grounds to excite a suspicion, that the dog was mad.

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PRESIDENT. Whether the dog was mad or not, he having bitten *Fitzrandolph*, the killing of him is justifiable. The dog was a nuisance: and every man may abate a nuisance. This is not the case of a dog set to guard property, and killed by a person interfering improperly. Such killing would not be justifiable.

The jury found a verdict for the defendant.

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JOHN MARIE v. SAMUEL SEMPLE.

**SAMUEL SEMPLE** had cleared, fenced, and, for several years, occupied a piece of ground, in the manor of *Pittsburgh*; but neglecting to take out a title for it, *John Marie* purchased it from the proprietaries; brought an ejectment against *Semple*, for it, and obtained possession; and now brought trespass for *mesne* profits. Evidence of *Semple's* clearing and improving the land was objected to.

PRESIDENT. The plain principles of right and wrong seem strongly to point out, that *Marie* ought not to put money in his pocket from the labour of *Semple*. The proprietaries permitted people to settle on their lands, on the presumption, that they would afterwards buy, and they gave a preference to the settler. We are inclined to admit proof, by *Semple*, that, when the land was recovered, it was in a better state by his labour,

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than when he went on it. Against this, let *Marie* shew the advantage which *Semple* received from the occupation, and, if any, the injury, which he may have done to it. Let the proof therefore be admitted; but, if the plaintiff's counsel choose to argue it again, we will reserve this point.

The jury found a verdict for one dollar damages.— And the counsel for the plaintiff being satisfied with it, there was judgment on this verdict.

## WESTMORELAND COUNTY.

June Term, 1794.

Lessee of SAMUEL DIXON v. SAMUEL MOREHEAD.

**A**T the trial of an ejectment for 317 acres of land, in *Armstrong* township, the plaintiff produced an application, No. 588, dated 3d *April*, 1769, in name of *David M'Crory*, for 300 acres, on a run emptying into *Blacklick* creek, five or six miles above the *Blacklick*, on the west side of said creek; and a survey of 317 acres, made 22d *April*, 1773, described as in the location; and a conveyance of the same land, in fee-simple, from *David M'Crory* to *Samuel Dixon*, dated 3d *July*, 1772.

The defendant shewed a warrant, dated 24th *January*, 1785, in name of *Samuel Morehead*, the younger, for 300 acres of land, including his improvement, on *Twolick* creek, and the mouth of *Stoney* run, adjoining land of *John Pumroy*, in *Armstrong* township, *Westmoreland* county, charging interest from 1st *March*, 1771; and a survey of 295½ acres made on this warrant. He shewed also an ejectment brought by him, in this county court, for this land, against the present plaintiff, of *January* term, 1774; and a verdict and judgment for him, of *October* term, 1785. But this verdict seemed to have been without any examination of *Dixon's* title; and it seemed also to have been in his absence. *Morehead* now

also shewed a written award in his favour, by four of five arbitrators, to whom, or a majority of them, there was a submission by the parties of their dispute respecting this land. The opinion of the fifth arbitrator was in favour of *Dixon*. This award was made in the presence of both parties, and after examination of their evidence of title. 1794.

The survey made on *McCrory's* application corresponded to the description. The creek, in 1769, and for about four years afterwards, was called *Blacklick*; but, from that time, it was called *Twolick*. In July or August, 1773, *Dixon* had built a cabbin on this land. In December, 1772, *Morehead* went to improve on this land, with a view to hold it, and to build a mill, on a mill-seat, at the mouth of the run; built a cabbin, but did not cover it. And, in May, 1773, he plowed ground for a garden, and planted potatoes. This was close by where *Dixon* afterwards built his cabbin. In the fall of 1773, *Morehead* lived with his family in *Dixon's* cabbin. In 1774, or 1775, *Morehead* had a field cleared, and built a mill, which was going in 1775, and was burnt by the *Indians* in 1778; since which time, the land has been vacant. The cabbin built by *Morehead*, in December, 1772, was 248 perches from *Dixon's* cabbin, was not included in *Dixon's* survey, and had good land all round it.

*Brackenridge*, for the defendant, rested chiefly on the settlement made by *Morehead*, and on the award in his favour.

*Woods*, for the plaintiff, referred to the act for opening the Land-Office in 1784, and to the preamble to the opening of the Land-Office in 1769, and contended that improvements, since the purchase of 1768, gave no title, and that no title could be obtained till 1784.

PRESIDENT. The act of assembly of 1786, continued by subsequent laws, now protects settlements or farms against any adverse title by warrant. Even before this law, it had been considered, in the general opinion of this country, that, by *general usage*, and a kind of *common law*, they were protected. Some decisions, since the last war, contradicting this general opinion, usage, or common law, the act of 1786 was thought necessary. And subsequent decisions have re-established the same principles, even with respect to titles previous to the act. But,



1794. both under that act, and the late decisions, it is an *actual settlement* or *farm*, that is protected, not a mere *improvement*, as it is called. The same idea is held out, in the preamble to opening the Land-Office, on 3d April, 1769, and in the 8th and 9th sections of the act of 3d April, 1792, for the sale of vacant lands within this Commonwealth. So that from the 3d April, 1769, to the 3d April, 1792, and to the last decisions of the judges; it appears to have been the prevailing and recognized opinion of legislators, judges, and proprietors, that no warrant or paper title is valid, as against a prior *actual settlement* or *farm*. But no act of the proprietors, no law or decision, has ever yet said, that what is called an *improvement* is protected.

The paper title of the plaintiff was clearly appropriated to this land, on the 22d April, 1773, by a survey of land corresponding to the description of the application. At that time, nothing on the part of the defendant, appeared on the land tending to a *settlement*, but a cabbin, built in December, 1772, unfinished, uncovered, and not included in the plaintiff's survey. This surely will not amount to what legislators, judges, or proprietors, have called an *actual settlement*. It amounts only to what is called an *improvement*, and what none have protected.

No attempt, to convert this improvement into an *actual settlement*, is made by *Morehead*, till May, 1773, after *Dixon* had, by his survey, appropriated this land to himself. Then, and knowing of this survey, he plows a small piece of ground, and plants potatoes in it. Soon after, in July or August, 1773, *Dixon* builds a cabbin, into which *Morehead* afterwards enters, lives in it in 1774, with his family. In 1775, he builds a mill.

If there had been a settlement by *Morehead*, at the time of *Dixon's* survey, leaving it out of the survey would not be sufficient. I should think the settler intitled to the usual quantity of land, contiguous to his settlement, and within his claim, though included in the adverse survey.

I have considered the plaintiff's title as attaching to this land, only at the time of his survey, on 22d April, 1773; because his location is not precisely definite; and because it is not necessary to carry it farther back, since

the defendant's actual settlement does not seem to have existed till in 1774.

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My idea is, that if a man makes a *settlement* or *farm*, on land before a paper title is attached to it; he ought to be protected. But if he make only what is called an *improvement*, he may as well lose this, as his adversary lose his office or paper title. If a paper title ought to yield to a *settlement*, an *improvement* ought to yield to a paper title.

It is pity, that any land should be considered as sold or appropriated, before it is surveyed.

One verdict in ejectment is not conclusive; and the former trial between these parties, seems to have been without any disclosure of the merits. A verdict in ejectment intitles only to possession, and does not determine the right.

The principal difficulty in this case seems to be in the award. In what light are we to consider it? If we consider it as an agreement of the parties, and apply to it the rule in equity, that what ought to be done is considered as done, it would operate as a title against the plaintiff. If we consider it only as a verdict in ejectment, it is no bar to a further prosecution of the title: and, as to title, the *English* law says, an award is not conclusive. I am therefore, disposed to think, that it should have no greater force, than a verdict and judgment in ejectment.

1 *Bas. abr.*  
132, 133, 140.  
3 *Comm.* 16.

The jury found a verdict for the plaintiff.

On the motion of Mr. *Brackenridge*, there was a rule to shew cause why this verdict should not be set aside, and a new trial granted.

At *September* term, 1795, the motion for the new trial was argued.

*Brackenridge*, for the new trial. The submission and award concluded the parties; and so the court ought to have directed the jury: whereas the court stated, that it should have but the effect of a verdict in ejectment.—

Award on submission amounts to a contract with sufficient consideration. And a consideration need not be expressed, if it be implied in the transaction. I consider the case of *Penn v. lord Baltimore* as decisive of the present case; for if the court of Chancery carry an award into execution, a jury will,

1 *Powell Contr.*  
330, 342,  
344, 368.  
2 *Powell Contr.*  
7-10.

1794. The distinction between awards of real property, and  
 of personal, arising only from feudal principles, exists  
 3 Comm. 16. not in *Pennsylvania*; and even in *England*, is reduced  
 to a mere point of form. Improvement-rights to land  
 pass by parole, like chattels. Whether it be a real or a  
 personal estate, therefore, in *Pennsylvania*, an award of  
 land is good.

The end of a reference is to settle amicably what cannot be so well settled in a court. It entirely defeats this end to give an award no greater effect than a verdict. It is the general opinion, that awards are final, and the general interest, that they should be so. The people know no distinction between awards of real and of personal property: and we ought to take their contracts as they understand them; especially as this is for their benefit.

Taking it either as an award or as a contract, the jury ought to have been directed to consider it as equivalent to a deed of the party under hand and seal.

3 Comm. 16, 17. *Ross*, against the new trial. The point in *Blackstone* is not, that an award is not final, but that an award will not pass real estate. There is good reason why an award of personal estate should be final, because a verdict is final. But the whole analogy of the law is, that a verdict, though in a writ of right it is, in an action for the possession of land is not final. Why then should an award be final?

Execution goes out on a report of referees, as on a verdict, except where, as here, a specific thing is awarded. Had this been a reference by rule of court, in ejectment, it would only have given the possession, and could not have prevented another ejectment.

Unpatented lands, held by location, warrant, or survey, are always considered as real estate. Dower will lie of them; yet the plea is seizin or not. This is a case of land held by location and survey.

2 Powell Contr. 7, 10. The case of *Penn v. lord Baltimore* proves, that an award is not final, for there was a necessity to file a bill for a specific performance. Why this, if an award be a conveyance?

1 St. L. Our act of assembly makes an award but as a verdict. However this is not an award: for the submission was to five; and the award states, that there was one dissentient voice. The award is on a parole submission to



five, was assented to only by four, and ought not to have been read to the jury. Had it been perfect, it could have no other effect than a verdict. 1794.

In *M<sup>c</sup>Kee* assignee of *Berrickman v. M<sup>c</sup>Clure*, tried in the court of Common Pleas of *Allegheny* county, the president considered an award as not final, and left it to the jury, who found against it. In *Estep v. Wallace*, at a court of Nisi Prius in *Washington* county, the chief justice left an award to the jury, who found against it. In *Howard v. Pollock*, at Nisi Prius, in *Washington* county, an award, on an arbitration bond of submission to five, signed only by three, was not suffered to be read to the jury. *March Term, 1792.*  
*May, 1792. M<sup>c</sup>Kean C. J. and Yates J.*  
*May, 1795. M<sup>c</sup>Kean C. J. and Yates J.*

We have certificates of two of the referees or arbitrators, that their intention was, that the award should have no other effect, than a verdict in ejectment; that, before they gave their award, it was proposed by one of the referees, that the parties should be bound to stand to it; and they objected to this, and it seemed to be dropped.

*Brackenridge* in reply. The court of Chancery only established the evidence of *William Penn's* title. That case is altogether with me. Chancery will decree a conveyance on any act *en pais*, which will be a ground of it, considering that as tantamount to livery and seizin.

Our act of assembly is in imitation of the act of parliament 9 and 10 *William 3*, and meant the same thing and no more. A report or award is only examinable, as to corruption or misbehaviour of arbitrators or parties. *1 St. L. Comm. 17.*

The general understanding of submissions is that the award of a majority is sufficient. The choice of an odd number is to prevent the embarrassment arising from an equal division, and secure an end of the controversy.—There was evidence that the submission was to five, or a majority of them.

It would have been foolish to have inserted in the award, that it should be final; and this proposal was judiciously rejected. The arbitrators were only to make an award, not to declare its validity or effect. It is immaterial what they thought as to this. The parties meant it to be final. The law makes it so.

At *December* term, 1795, the opinion of the court was delivered.

1794.

PRESIDENT. In the trial of this ejectment, at *June* term, 1794, the defendant gave evidence, that he and the plaintiff, had, before the commencement of the action, submitted their dispute, about the right of the land in question, to five arbitrators or a majority of them; and that four of the five had awarded in favour of him, the fifth only being in favour of the plaintiff's title.— In the direction to the jury, I told them, that, considering this award as giving the right, it could not have this effect, for, by the law of *England*, title to real estate cannot be transferred by award; and, considering it as giving the possession, it was not decisive, for one judgment in ejectment is no bar to another ejectment for the same land.

A verdict having been given for the plaintiff, a motion has been made, to set it aside, on the ground, that the jury ought to have been directed to consider the award as decisive of the right of these parties to this land.

Disputes about property may be terminated, and the right transferred from one of the contending parties to the other, by consent, by compulsion, or by a combination of both. It is by consent, when one agrees to give, and the other to accept, something else, in lieu of the property in dispute. It is by compulsion, when one obtains process and sentence of a competent court of justice against the other. And it seems to be a combination of both, when, unable to settle the dispute themselves, they refer it to others, to whose opinion they bind themselves to submit. Whichever of these methods be adopted, whether contract, judgment, or award, the dispute is thereby settled, and the right ascertained.

1 *Powel**Contr.* 318-9.1 *Bac. abr.* 132-4 1 *At.* 64.1 *Comm.* 16.4 *Vesey, jr.*

365-70.

1 *Com. Dig.*301. 2 *Eq. Ca.*80. *Vinior's**Ca.* 8 *Co.* 80.1 *Salk* 69, 76.2 *L. Ray* 1840*Woods' Inf.*

548-51.

*Leff.* 426.3 *Comm.* 16.

An award is sometimes considered as a contract, sometimes as a judgment. And arbitrators are sometimes considered as the substitutes, and sometimes as the judges of the parties. They can do whatever the parties themselves can do, and more than courts can do. Their power is revocable, as a power of attorney; and, if not given by deed, no action lies for its revocation; for, as *ex nudo pacto*, so *ex nuda submissione, non oritur actio*.— The submission implies mutual promises to perform the award. The award is a contract, and is considered as similar to accord and satisfaction, and equal to the judgment of a court.

It is true, that the Supreme court of *Pennsylvania* has considered an award, as on a footing with a verdict, and equally under their control. But other decisions in this state, and the rules of the *Roman* and *English* law, viewing arbitrators as both judges and jury, have treated awards with higher respect. The courts, both of equity and law, have constantly refused to enter into the merits of the matter referred, or examine the justice and reasonableness of the award; and have declared, that, the arbitrators being judges chosen by the parties themselves, they cannot object to the award, as unreasonable, or as a judgment against law: for they have referred their dispute to the judgment of the arbitrators, and that would be a ground for setting aside every award. Lord *Hardwicke* doubts whether an award, like a decree, can be set aside, on the discovery of new evidence. And in a case in Chancery, of an account, which, after many errors had been assigned, and allowed by the master, having been referred to arbitrators, was reported a just account; lord *Thurlow*, though he expressed great surprise at the report, and spoke very hardly of it, added, that "the parties, by choosing private judges, have placed it beyond the reach of any principle of law."—

But though, when the parties themselves choose their own judges, chancery will not generally relieve against the award; yet, where there is a reference, by order of that court, and the award appears unequitable, it will not be decreed. And, when the reference is to an arbitrator, to enquire into facts, he is in character of a master in Chancery, or a jury in a trial at common law; and the court is to draw the conclusion; or, if he does it, the court will see that he has drawn a right conclusion. And there are also many cases, in which though the submission be general, and to arbitrators chosen by the parties, yet courts will hold the award as void. The grounds on which they will do this, appear either in the award itself, or in the parties, or in the arbitrators:\*

\* In an action at law on an award, evidence of partiality or corruption in the arbitrators was refused, as affecting third persons, and as out of the award and the issue. The remedy for this was stated to be by action against the arbitrators, or by bill in equity to set aside the award, where the arbitrators may be made parties, and may be made pay costs. 2 *Wils.* 148—2 *Atk.* 396—2 *Vesey*, 316.

1794.

*Williams* vs. *Craig*, *Dall.* 313. *Holingsworth* v. *Leiper*, ib. 16. *Vinn.* Just. *Inst.* 612, 710. *Woods' Inf.* *Civ. law* 389. *Anderson* vs. *Coxeter*, 18 Str. 301. *Lucas* v. *Wilson*, 2 Barr. 701. *Herbert* vs. *Buckley*. *Ridgeway's* ca. temp. L. *Hardw.* 296. 1 *Atk.* 64. 3 *Atk.* 529. *Vesey* jr. 370. *Ridgeway's* ca. temp. Ld. *Hardw.* 299. *Price* v. *Williams*. *Vesey*, jr. 365.

1 *Eq. Ca.* 50.2 *Vesey* jr. 370.1 *Bac. abr.* 134

-5. 144-7.

1 *Com. Dig.*379. 1 *Eq. Ca.*50-1. 2 *Eq.**Ca.* 80-1.



1794.

1 *Salk.* 71-3.1 *Atk.* 64.3 *Comm.* 17.1 *Lofft.* 554.3 *Atk.* 644.2 *Vesey* 315.*Ridgeway's**ea. temp. Ld.**Hardw.* 296.*Vesey, jr.* 270.

as if the award be not final, or mutual, or be uncertain, absurd, impossible, or unlawful; or be erroneous on the face of it; or if either of the parties, or rather, perhaps, if the party in whose favour the award is, has procured it by undue means, by fraud, or imposition on the arbitrators or the other party; or where the arbitrators misbehave themselves, are partial, interested, or corrupt, or proceed irregularly, or on a plain and gross mistake, either in law or in fact. "But," says lord *Thurlow*, "in case of mistake, it must be made out to the satisfaction of the arbitrator; and the party must convince him, that his judgment was influenced by that mistake, and that, if it had not happened, he should have made a different award."

Such seems to be the law of *England*, and, excepting the decision of the Supreme court already suggested, the law of *Pennsylvania*, respecting the effect of awards. Under the regulations, which I have stated, awards seem generally to have been considered as a kind of judgments, given by private courts, constituted by the parties, and equally binding as a contract of the parties, or a judgment of a court of competent jurisdiction. Whether our act of assembly, by directing, that reports in references of causes depending, *being approved by the court, should have the effect of verdicts*, meant to make such reports liable to other exceptions, than those allowed in *England*, reduce them to a footing with verdicts, and subject them to the same exceptions as verdicts are subject to; or meant only to submit them to the same exceptions, as may be made to such reports in *England*, and to give, to a judgment on a report, the ordinary process after judgment on a verdict, instead of the process of attachment used in *England*, was, before that decision in the Supreme court, I believe doubtful.

I have hitherto had no occasion to state particularly the several kinds of awards, which exist in *England*;—because I think the effect of each is the same, and their difference is in the remedies, or means of execution. I shall now however observe, that, in that country, there are three kinds of awards, two at common law, and one by statute.

1. At common law, the parties differing, may agree, either by word, or by writing sealed or unsealed, to sub-

*Lucas v.**Wilson.*2 *Burr.* 701.

mit their dispute to arbitrators, without instituting any suit, and the award of the arbitrators binds the parties. 1794.  
 If it be not obeyed by either party, the other has his remedy, by an action at law, either on the submission, or on the award.

2. Where the parties have instituted a suit, either at law or in equity, they may agree to withdraw the examination of it from the jury or the court, and submit it to arbitrators, making this submission a rule of the court, where the cause is depending. The award, when made, is brought into the court, and, on the complaint of either party, if it has been improperly made, the court set it aside, or, if no impropriety appear, compel obedience to it, by process of attachment; disobedience being a contempt of the rule made by the court.

3. From the experience of the use of these peaceable and domestic tribunals, a statute enacted, that parties in any case, where the remedy is by personal action, or suit in equity, may, without any such action or suit, submit their difference to arbitration, and agree that such submission be made a rule of any court of record, and this submission, having been made a rule of one of the courts, and the arbitrators having made their award, it is returned into the court of which the submission was made a rule, and, by that court, on the complaint of either party, within a limited time, annulled; or it is enforced, in the same manner as an award in a case where a cause was depending at the time of the submission. For this statute is only declaratory of what the common law was before, in cases where there was a cause depending, and was made to put submissions, where there was no cause depending, on the same foot as those, where there was a cause depending. 3 Comm. 17.  
9, 10, W. 3.  
c. 15.

4. Our act of assembly, in cases of mutual accounts, 1 St. L. did not copy this *English* statute, but introduced into *Pennsylvania* a fourth species of awards, which differs from the second species before mentioned, in this, that the report, when approved by the court, is to be proceeded on, as a verdict, by judgment, and then by execution or *scire facias*, as the case may be, not by attachment; and according to the decision of the Supreme court, in this also, that it is open to the exceptions which may be made to a verdict. 2 Burr. 701.

1794.

Together with this, the first and second kinds of awards must be considered as existing here, in full force; and these only: for the third species has never been introduced here.

*Williams v.*  
*Craig,*  
*Dall.* 313.

With respect to the decision of the Supreme court, it will be sufficient to observe, that this award is not of the same kind with that, on which that decision was made. That was of the fourth kind, under our act of assembly, on a reference of a cause then depending in court. The award, in the case before us, is of the first kind, at common law, and not under our act of assembly.

It was stated to the jury at the trial, and it must be repeated now, that though there have been awards in ejectment, and of leases, the possession only, a sort of chattel interest being in question, and though if a conveyance of an estate in fee-simple be awarded, its refusal is a breach of the arbitration bond; yet, a judgment in ejectment being no bar to another ejectment, and, by the law of *England*, an award being insufficient to transfer the right to real estate; the award was not conclusive in this action. This, which was the principal difficulty at the trial, is the point now to be discussed. It has come before us in a shape, in which I have not observed it before, in any court; and, however unfurnished with guides and precedents, we must now examine and decide it.

Considering it as a principle of *English* law, that an award cannot transfer title to real estate, I do not see how, when an award was given as evidence of title to real estate, consistently with that principle, any other direction could be given to the jury.

3 *Comm.* 16.

The argument of the defendant's counsel encountered this difficulty, by urging, that the reason for refusing to awards a binding force on real titles, having originated from feudal principles, to prevent collusive alienations, without the consent of the lord, does not exist in *Pennsylvania*; and, therefore, the distinction between awards of real and of personal property, will not be kept up.—That, even in *England*, this was reduced to a mere subtilty in point of form, and was easily evaded, by awarding a conveyance, which, if refused, can be compelled, by exacting the penalty of the arbitration bond; for, the refusal being a breach of the award, the penalty can



be saved only by compliance. That an award was equivalent to an agreement; and that improvement titles, inchoate or imperfect titles, to land, were transferred by parole, like chattels. That the case of *Penn v. lord Baltimore*, is in point for the defendant here. And that any sufficient act *en pais* will, in Chancery be considered as equivalent to livery and seisin, and ground a decree of conveyance. Thus, whether as a contract or an award, the evidence was, in *Pennsylvania*, conclusive against the title of the plaintiff.

1794.

1. This argument gives up the defendant's case, if the *English* common law principles of awards of real property are binding here.

2. By relying on the case of *Penn v. lord Baltimore*, and the practice of the court of Chancery, it seems not to be wished, that we should go farther than the court of Chancery has gone, in like cases.

3. Or some other principles must be established, conformable to the state of real titles in *Pennsylvania*.

1. As to the first, I repeat, that I cannot yet see how, on the principles of the common law of *England*, taking them as stated, the direction to the jury could have been otherwise than it was. But this subject will recur under the last head.

2. I am disposed, in all possible and proper cases, to adopt the rules of decision in the court of Chancery; and, in this case, to go as far, as any court of Chancery has ever gone. Courts of Chancery have, in many instances, decreed specific performance of an award of title to real estate. But it must be observed, that, in all cases, where they have done this, there has been an assent to the award, by the person against whom the decree was prayed, or an acceptance by him of something under it, which is evidence of assent, or, with his connivance, or at his request, a performance, or part performance, of it, by the other party. And lord *Hardwicke* expressly declares, that a bill, to carry an award into execution, where there is no acquiescence in it by the parties, or agreement by them, afterwards, to have it executed, would certainly not lie. Considering that an award is as a contract, and that equity decrees a specific performance of contracts, the best reason that I can see for the

*Scott v Wray*1 *Rep. Cha.*84. *Bales v.**Procter, ib.*144. *Evans v.**Cogan,*2 *Wms.* 450.*Hall v. Har-**dy,* 3 *Wms.*187. 1 *Eq. Ca.*51. 2 *Eq. Ca.*

28-9.

*Thomson v.**Nosi.*1 *Atk.* 62.1 *Perrel Con-**tr.* 318-9.

1794.

court of Chancery distinguishing between a contract made by the parties themselves, and an award made by their substitutes, is this, that in contracts, the parties know the terms and extent of their engagement, when they enter into it; and it is, therefore, against conscience to refuse compliance. But, in awards, they know not the terms and extent of their engagement, which depend on the judgment of the arbitrators, and, as it may turn out harder, than the party intended, Chancery may refuse to make performance a point of conscience, and leave the person who complains of non-compliance, to his remedy at law.

1 Vesey 444.

The case of *Penn v. lord Baltimore* is not in point, or, at least, not conclusive. It is not the case of an award,

ib. 445.

but of an agreement in writing. One of the objections to the decree prayed for, in that case, was, that the articles were in the nature of submission to arbitration, which cannot be supplied by interposition and act of the court of Chancery. But said lord *Hardwicke*, "the articles are not like submission to arbitration; for, in those cases generally, the time is conditional, so as determination be made by such a day: but here the line and circle are agreed on. This is a particular, certain, specific contract of the parties; nothing left to the judgment of the commissioners, who are merely ministerial, to run the line, &c. according to the agreement."

ib. 450.

3. If the argument for the defendant be not supported, on the rules, either of the common law, or of equity, it remains therefore to be considered, whether it can be supported on some other principles, conformable to the state of real titles in *Pennsylvania*.

If the distinction between awards of real and of personal property rested only on feudal principles, perhaps the maxim *cessante ratione, cessat et lex*, and a principle, which I think good, that we take not such parts of the common law of *England*, as are incongruous to our circumstances, might be a sufficient answer to it.

1 L. Ray 115.

But another ground is given for this distinction, to wit, that things in the realty cannot be recovered on an award. For, though arbitrators are in the room of parties, and act in their stead, and can do what they can do,

1 Bac. abr. 132

they can do no more; therefore an award cannot pass corporeal inheritance, for the parties themselves cannot

pass that, without solemn livery. Yet this reason, comparing it to the authority of the parties, seems to admit, in substance, the authority of the arbitrators, over real estate, and to reduce the distinction, as *Blackstone* says, to a mere form, by an alteration of which, the substance may be effected. For doubtless an arbitrator may award a conveyance or a release of land; and it will be a breach of the arbitration bond, to refuse compliance. In strictness, therefore, the rule of the *English* law may amount only to this, that an award, of itself, does not operate as a conveyance of the land. And this perhaps is what chief justice *Treby* meant, when he said, "that things in the realty might be submitted, as well as things in the personalty; but they could not be recovered on the award."

1794.

3 *Comm.* 16.  
*Hunter v.*  
*Bennison,*  
*Hardr.* 43.

1 *L. Ray* 115.

This, therefore, brings us to the consideration of what interest the parties had, at the time of the award; and whether it be necessary that the award should operate as a conveyance.

It is contended by the counsel for the defendant, that improvement rights pass by parole, like chattels. I should be unwilling to recognise this generally. It might affect creditors. It might lead to a conclusion, that such rights are not bound by a judgment, and might be sold on execution as chattels; or that a subsequent sale, with delivery of possession, might defeat a *bona fide* prior sale by deed. I am not prepared to say, that this is law. I do not believe, that it is the received opinion. I think the practice of lawyers and others is contrary to this.

At the time of this award, *Morehead* was in possession of the land. By *Dixon's* two ejectments against him, his possession is admitted. He wanted nothing but title; and that was in the state. *Dixon* could have deceived no man, on the credit of this land; and one ground for requiring solemnity of conveyance exists nowhere. Without determining, therefore, whether an improvement or location right be a real or a chattel interest, or whether any others than the parties would be bound by an award of it, let us see, whether, in this case, too little stress was not laid on the award in the direction to the jury.

The award is in *June*, 1791. *Dixon*, in virtue of his location, has a survey made in *April*, 1773. *More-*



1794.

*head* has a warrant in *January*, 1785. Both therefore, at the time of the award, had a claim on the state for a title. To settle the point between them, to whom the state should give the preference, they might enter into an agreement, and, though this were by parole, I think, the executive agents of the state, and the courts of justice,\* would hold it conclusive on them, or, at least, on the party out of possession; or they might submit their difference to arbitration, and, I think, the executive agents of the state, and the courts of justice ought to hold the award conclusive on them, or, at least, on the party out of possession. They have chosen their judges; judges tied down to no strict or formal rules in restraint of justice; but vested with ample powers for the most equitable redress to both parties. The authority of a tribunal of this kind ought not to be lightly impugned, nor its sentence easily evaded. If the jury had been directed to consider the award as conclusive, it would not have been so much a decree of a specific performance of an award, as making it a bar to a further prosecution of the claim submitted. It would not have been an *interference*, but a *refusal*, to change the state of things, and saying, they should remain as they were.

I think, therefore, that, in the direction to the jury, sufficient weight was not given to the award in this case; and, therefore, that there ought to be a new trial.—When I say so, I, at the same time, declare, that I do it with some anxiety; and I wish, for the settling of so important a point, that the next time this question is discussed, it may be before judges, whose opinion will give more weight to the decision, than any judgment, that I can form.

It will be observed, that we do not take into view any opinion which the arbitrators may have entertained of the legal effect of their award. They were to give their judgment on the case submitted. The operation or effect of their judgment is to be dictated by the law.

\* Where a suit is depending for the title of land, the Board of Property will not issue a patent for it, till the suit is determined; and will then give a patent to the successful party.

It will also be observed, that, though our opinion rests on all the circumstances of this case; yet, as in all cases, a submission and award is a solemn transaction, and ought to mean something; perhaps less than we have done would be making it mean nothing at all. The effect of an ejectment is known and settled, and no one is deceived by it.

1794.

NOTE.—Since the above opinion was delivered, I have seen the report of a case which was tried before lord *Kenyon* in *July*, 1795. It was an action on the case for unskillfully navigating his barge on the river *Thames*, whereby the plaintiff's boat was sunk. In opening for the plaintiff, his counsel stated that after the plaintiff had received the injury, the matter had been referred and an award made. Lord *Kenyon* said he had ruled before that where parties had agreed to submit their differences to any third person, and he had undertaken the business and made an award, the parties should be bound by it; and that he who was dissatisfied with the determination, should not be allowed to have recourse to an action; for that after taking his chance of having a determination in his favour he was then too late to recede from his engagement. If, however, there were any circumstances attending the reference to such third person which would be a sufficient objection, in point of law, to an award, such as partiality in the arbitrator, not hearing the party's witnesses, &c. it should be open for the parties in such case to shew it at the trial.

The defendant failed in proving any circumstance of this sort, or non-acquiescence to the reference which he also attempted to set up, and the plaintiff obtained a verdict, *Bailey v. Lechmere*, *Esp. Rep.* 377.

The case of the lessee of *Dixon v. Morehead* was tried at a court of Nisi Prius in *May*, 1798, before the Chief Justice and *J. Smith*, who held the award not binding, and the plaintiff's title regular and fair.

There was a verdict for the plaintiff.

## PENNSYLVANIA v. JOSEPH CAMPBELL.

1794.

**CAMPBELL** was indicted for stealing a fifty-dollar bank note, the property of *Daniel Proffer*.

*William Todd*, having contracted with the Governor for making a certain distance of the state road from *Philadelphia* to *Pittsburgh*, employed *Campbell* and *Proffer*, to make the road in part of that distance; and advanced 60 dollars, viz. 10 silver dollars, and a 50-dollar bank bill. *Campbell* took up the bill, and *Proffer* the silver; and they went to a neighbouring tavern, to get the bill changed for dollars, and then divide the whole money equally between them. Not getting the bill changed at the tavern, *Campbell* desired *Proffer* to give him the silver, and take the note to another tavern, on his way home, and there have it changed, and give him his share afterwards. The note was then lying on the table with a paper in which it had been given them by *Todd*.—*Proffer* gave *Campbell* the silver, and proceeded to take up the note. *Campbell* bade him stop till he folded it up. While *Campbell* was folding it up, *Proffer* turned about to drink with some one in company. *Campbell* delivered the folded paper to *Proffer*, who immediately put it in his pocket. When he opened the paper at home, there was no note in it. There was some evidence, that *Campbell*, folding and delivering the paper, retained a *dirty paper*; and that he, afterwards proposed to pay *Proffer* 30 dollars, on his return from *Philadelphia*, whither he was going, if *Proffer* would swear, that he had lost the note. This *Proffer* refused to do.

*Woods* and *Young*, for the defendant. This can be no larceny; for there never was a possession in *Proffer*; and there was a joint property. Supposing, therefore, a purloining or embezzling, it is not stealing. The offence, if there be any, is of another kind a cheat.

*Hawth. 135.*  
in not.

*Galbraith* and *Brackenridge* for the state. There is an actual and constructive possession, an absolute and special property; and larceny may be of either.

PRESIDENT. There must be a *taking*, as well as a *carrying away*. Unless you can conclude, from the proof, that *Campbell* had abandoned the possession of the note to *Proffer*, who, from this abandonment, and his under-



taking to change the note, became liable to *Campbell*; or that *Proffer*, in consequence of his agreement, with consent to change, had taken the note; he had no possession; therefore, there can be no taking, and, of course, no larceny. But, if the possession was changed from *Campbell* to *Proffer*, a taking and carrying away by *Campbell* would be larceny, though *Proffer* had a share in the note; for the change of possession rendered *Proffer* answerable to *Campbell* for his half. If the possession of the note was not changed, and if *Campbell* imposed an empty paper, for one inclosing a note, though punishable as a misdemeanor, this, is no felony. Therefore, if the proof amount only to this, there can be no conviction on this indictment; although you or I may think, that there is little natural difference in the degree of enormity of such misdemeanor and larceny.

The jury found him guilty.

1794.

## WASHINGTON COUNTY,

June Term, 1794.

WILLIAM DAVIS, for the use of JAMES EVANS, v.  
DAVID CAMMEL.

**A**N action of debt was brought to *March* term, 1793, on a single bill, for 13*l.* 3*s.* 11*d.* dated 4th *October*, 1792, payable, with lawful interest, on 27th *November* ensuing, and assigned 19th *December*, 1792. The defendant, at the trial, offered a deposition of the assignor, to prove, that it was by mistake, that the note was made payable in *November*, 1792, and that it was his and *Cammel's* intention, to make it payable in 1793.

*Ross*, for the plaintiff objected to this, as invalidating the assignment made by himself, and no man shall be suffered to invalidate his own acts. The act of assembling for the assigning of bonds precludes the assignor from releasing the debt; and depositions or acknowledgements subsequent to the assignment may, in effect,

17. Rep. 300.

1 St. L. 107.

1794.

do the same thing, and defeat the provision of the act of assembly.

*Bradford* and *Purviance*, for the defendant. The original payee of the note could not have recovered, if such evidence had been offered against him : and the act of assembly puts the assignee precisely in his situation, so as to recover only as the assignor could.

*See Cook v. Laughlin, post* PRESIDENT. There seems to be strong reason, to consider the assignment, as an engagement, by the assignor to the assignee, that so much money as appeared due, was due, on the note, at the day therein specified : and the evidence offered goes to contradict this ; and, besides defeating the provision of the act of assembly, and enabling *Davis* and *Cammel* to cheat *Evans*, goes also to prove a thing contradictory to the note, and make it materially different from what it is. The mistake is in the defendant, and ought not to affect a third person not concerned in it. Shall we rectify this mistake of *Cammel*, at the expence of *Evans* ? *Cammel*, when sued, might have informed *Evans* of the mistake, tendered the costs accrued, and the debt, when, by his own acknowledgement, it was really due. He would then have come forward with some equity. But no evidence is offered, that *Evans* knew of the mistake previous to the suit, or at any time since. Such evidence might be proper. The acknowledgement and depositions are subsequent to the assignment, which took from *Davis*, and gave to *Evans*, all interest in the note ; it is therefore the acknowledgement of one having no interest ; and cannot affect him who has the interest.— Were there no assignment, and the mistake mutual, unless the party bringing the suit were conscious of the mistake, why should *all*, or perhaps why should *any* of the costs fall on him ? We will however reserve the point.

By consent a verdict was given for the plaintiff, subject to the opinion of the court on the deposition offered, and another to be made with a view to establish the mistake and *Evans*' knowledge of it.

Judgment was given for the plaintiff for 13*l.* 3*s.* 11*d.* debt, with 9*s.* 2*d.* damages, and all costs subsequent to 27th November, 1793, when, at all events, *Cammel* ought to have paid the debt.

GEORGE ROGERS CLARKE v. JOHN M<sup>C</sup>INTIRE.

AN action of debt, on a bond in the penalty of 500*l*. 1794. was brought to *April* term, 1792. An action had been brought, on the same bond, in *Ohio* county, and discontinued. The bond was for the delivery of flour, and was given as the consideration of a purchase of a tract of land in *Ohio* county, claimed by virtue of an actual settlement and a military warrant. The purchase was made 17th *July*, 1786, the date of the bond. The defendant pleaded payment, with leave to give want of consideration in evidence. On this plea, the defendant shewed an exemplification of a patent, dated 11th *October*, 1783, from the state of *Virginia* to *Moses Chapline* for 500 acres, surveyed 11th *December*, 1781, on a military warrant, dated 19th *March*, 1781. Evidence was also given, from the surveyor, of a survey for *David Rogers*, on a certificate of an actual settlement, prior to that of *G. R. Clarke*, of 400 acres; and that these two surveys took up all the claim and survey of *Clarke*, except a long narrow strip of about 50 acres. *Moses Chapline* is in possession of his survey, believes his title the best, and will maintain it. The heirs of *David Rogers* also continue their claim and possession. *Clarke* had no military warrant entered; nor had he any certificate of settlement, till *November*, 1786, when on an application in his name by *M<sup>C</sup>Intire*, the court of *Ohio* county ordered a certificate to be granted of a settlement in 1773.

*Brackenridge*, argued for the defendant.—*Ross* and *Bradford*, for the plaintiff.

PRESIDENT. It has been objected, by the counsel for the plaintiff, that we have no authority to try the title of land in *Virginia*. Directly, it is true, we have not. But when it comes incidentally before us, in a case over which we have jurisdiction, the principal draws after it all its incidents. It is indifferent where the land lies, be it in *Turkey* or in *China*, the right to it comes incidentally before us, in the trial of a personal action, for the trial of which its examination is necessary: therefore we have authority to examine it.



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But who brought the cause here? The plaintiff was, at the time of the contract, and of bringing the suit, a citizen of *Virginia*, and is now a citizen of *Kentucky*.—The defendant was then, and is yet a citizen of *Virginia*. The contract was made in *Virginia* respecting land in *Virginia*. The plaintiff arrested him in *Pennsylvania*, and would use his own arts, to deprive the defendant of the advantage of his defence. Had the cause been tried in *Virginia*, the courts there could try the right; and this objection would not have existed. Had the cause been tried in *Virginia*, there is a court of Chancery there, to which the defendant could have applied for an injunction, to stay the plaintiff from execution, till he could try the title, and shew whether he had value or not for the bond. In *Pennsylvania*, there being no court of Chancery, or power of injunction, defendants are at liberty to give want of title or any other consideration in evidence. The objection, that the land is in *Virginia*, comes with a very ill grace, on the part of a man who has himself brought the cause here, if he would deprive the defendant of the advantages, which he could have had where he and the plaintiff lived, and where the contract was made, and the subject of dispute lies.

We endeavoured to reduce the matter to the same shape, as if the cause had been tried in *Virginia* under the power of an injunction. We proposed a judgment for the plaintiff, with a stay of execution till the title could be tried in *Virginia*. But the plaintiff's counsel rejected this proposal.

It will be attended to, that, at the time of the contract, there was a patent, for *Moses Chapline*, for part of the land surveyed by *M<sup>c</sup>Intire* on this claim. If we were excluded from examining *Virginia* titles; is not this conclusive evidence, that *Chapline* has the title? This patent, being previous to *Clarke's* certificate on his settlement, excludes the certificate; for the authority of granting certificates was for unpatented land.

*Act of Virginia, 1779.*

It will also be attended to, that *Clarke*, at the time of the contract, represented that he had a military warrant located on the spot. There is evidence from the surveyor of the district, that no such warrant was or is located. The question then is, Did *M<sup>c</sup>Intire* take his chance of the land, knowing all the circumstances? Or

did *Clarke* sell, and *M<sup>c</sup>Intire* buy a title represented or supposed good for a competent price? The presumption is strong, that it was intended on both sides, to buy and sell a good title. Whether the fact be so or not, you will judge from all the circumstances.

If a supposed good title was bought, the next question is, For how much land; and whether *M<sup>c</sup>Intire* has got all that was intended as the worth of his money? The value of whatever part he has not got of what he ought to have got, you will, under this plea, consider as paid of the bond.

As to *David Rogers'* title, the defendant has not made a clear case. He ought to have shewn a good title against himself. He has only shewn presumption, the weight of which, considering the proposition which has been made to the plaintiff and rejected, you will judge. If any of the land sold be within *Moses Chapline's* survey, you ought to deduct in proportion.

The jury found a verdict for the plaintiff for 25*l.* 5*s.* 1*d.* and costs of suit; with this further, that the defendant should prosecute for the recovery of the whole land, and, if recovered, pay the contents of the bond.

This was compelling the plaintiff to accept the proposition, which had been made. The 25*l.* 5*s.* 1*d.* found for him, was for the 50 or 58 acres not included in either of the surveys of *Chapline* or *Rogers*.

*Rofs*, two days after, on the part of the plaintiff, moved for a new trial, on a case stating the circumstances, and read 3 *Comm.* 390, and the case of *Steinmetz v. Curry*, *Dall.* 234, and argued on the following points.

1. The court left it open to the jury to presume title to destroy the title sold, when the action was on a deed, and it became incumbent on the defendant to shew want of consideration. The *onus probandi* was on him, and he must shew it absolutely, especially as he had a patent on the title sold and the certificate afterwards obtained from the court of *Ohio* county. The jury ought to have presumed no title, to wit, no certificate, because none was shewn; and the court ought to have so directed them, agreeably to the decision of the court of *Westmore-* *And p. 127*  
*land* county in the case of *Carnahan v. Hall*.

PRESIDENT. That case was decided on an exception to evidence. Here the evidence was admitted without exception.

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*Ross.* If the court, on exception, would have excluded the testimony, they ought positively to have directed the exclusion of its effect.

2. From the possible ignorance of foreign titles, there may be great inconvenience in this court judging of any foreign title.

3. We were surprised by hastily suffering the evidence to go to the jury, mixed with proper testimony.

*Brackenridge*, for the defendant.

1. The court did direct the jury, that it was not the best evidence; and left the presumption of the existence, and the presumption of the want, of the best evidence of title to operate against each other; that the jury might weigh both, and decide accordingly.

2. The *lex loci* is the ground on which every contract must be determined; yet a contract may be sued on any where. So, whatever be the consideration of a bond, *value* of that consideration may be examined by the court in which a recovery on it is demanded.

3. If any surprise had been, justice has been done.— There certainly does exist a good title, a patent, in the assignee of *David Rogers*. But through ignorance of the name, which we now know, we could not obtain it before the trial, and I did not think of the certificate and entry.

The court took time to consider it: and the case has never since been mentioned.

## ALLEGHENY COUNTY,

September Term, 1794.

NATHANIEL IRISH, Inspector of flour, *qui tam*, &c.  
v. ROBERT ELLIOT and ELIE WILLIAMS.

THE inspector declared, that *Elliot* and *Williams* offered to him, for his inspection and examination, 88 barrels or casks of flour, then intended for exportation by them; which said casks, under an act of assembly of 5th April, 1781, entitled, an act to prevent the exportation of bread and flour not merchantable, &c. were

1 St. L. 883.



of the description number 2, and ought to have contained each 196 *lbs.* when, in fact, they did not contain 196 *lbs.* but were deficient 1469 *lbs.* whereby action accrued to him, to have 55*l.* 1*s.* 9*d.* that is to say, 9*d.* per *lb.* deficient.

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Considering this as a mere question of law, the counsel on both sides agreed to submit it to the opinion of the court.

*Woods*, for the plaintiff. The act for preventing the exportation of bread and flour not merchantable makes

1 *St. L.* 885,

the cask and flour forfeitable for deficiency of weight, and prescribes the method of recovering the forfeiture.

The supplement to this act substitutes the forfeiture of 9*d.* per *lb.* deficient, instead of the whole flour and cask.

2 *St. L.* 2.

This is favourable to the exporter. The act to regulate the inspection of flour in these western counties refers to the first law, and, of course, to all the supplements.

3 *St. L.* 156.

Therefore the inspector has now no authority to seize the cask and flour, but only exact 9*d.* per *lb.* deficient. Divers statutes, relating to the same thing, are all taken into consideration, in considering any one of them.

The act of 39 *El. c.* 3, though expired, yet having been undoubtedly under the view of the legislature, when the act of 43 *El. c.* 2 was made, was taken into consideration in the construction of this last act.—

4 *Bac.* 646.

So 13 *El. c.* 10, being enlarged by 14 *El. c.* 11, though only the former be recited by 18 *El. c.* 11, it has been holden that the latter is virtually recited therein. The intention of the makers of a statute ought to be taken into view, rather than its letter. The legislature could not mean to make the flour and cask forfeitable here.

ib. 647.

And it is impossible to lay aside the clause imposing that forfeiture, without substituting the clause in the supplement directing the forfeiture of 9*d.* per *lb.* The inspectors and millers are subject to like duties, penalties, &c. as in case of the port of *Philadelphia*.

3 *St. L.* 156.

*Brackenridge*, for the defendant. The act of September, 1791, refers to a particular act passed on a certain day, the 5th April, 1781. A supplement constitutes, of itself, an act distinct from the original act, as much as an act to amend an act does. Extending an act does not extend a supplement. The act of 28th December, 1781, recognises a distinction between an act and a supplement.—

3 *St. L.* 156.2 *St. L.* 2, 3.

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From an oversight, we cannot infer an intention to supply it. And courts cannot supply the want of reflection, in the legislature. The intention of the legislature, is not what they intended to do, but did not; but what they have really done, discovering this by their expressions. We say, no penalty is imposed by the law. The legislature has omitted it. The act does not refer to all the acts on the subject, but to an individual act, intituled an act, &c. What the legislature thought they had done, but did not, is no law. A supplement, or a new law, must be made. Penal acts are strictly bounded. This is for a penalty, and the construction contended for is, at least, doubtful.

The court took time to consider. And, at the next term, Mr. *Brackenridge*, suggesting, that the allegations in the declaration were more unfavourable to the defendants, than the facts of the case were, desired to withdraw the submission, that he might plead to issue to be tried by a jury. This was done; and the cause, after some time, was settled by a reference.

It may not however be improper to add here the opinion which I had drawn up, to be delivered on the submission. It is as follows:—

The inspector declared, &c.

On this statement, It has been submitted to us to determine, whether *qd. per lb.* of deficient weight be recoverable.

35*t.* L. 156. The counsel for the plaintiff contended, that the western inspection law enacting, for the inspection of the western counties, the regulations contained in the act  
1 *St.* L. 883. intituled “An act to prevent the exportation of bread and flour not merchantable, and for repealing, at a certain time, all the laws heretofore made for that purpose,” does, of course, enact all the regulations contained in the supplement to that act: for all statutes, relating to the same subject, are to be considered as one law. The  
2 *St.* L. 2. forfeiture of *qd. per lb.* deficient, imposed by the supplement, cannot be laid aside, without adopting the severer  
4 *Bac.* 646. forfeiture of the whole cask, imposed by the original law; and the intention of the legislature is to be regarded rather than strict expressions.

The counsel for the defendant contended, that, this being a penal law, its construction will not be extended

by implication; for a penalty will not be exacted on a doubtful construction of a law. The intention of the legislature, that will be regarded by the judiciary, is not what they intended to do, and did not; but what they intended in what they really did, collecting their intention from their expressions. From an oversight in the legislature, courts cannot infer an intention to supply the oversight, and proceed themselves to do what the legislature would have done, if they had observed the omission. It would be strange, if what the legislature thought they had done, but did not, were a law; or if courts should take upon them to supply the want of reflection of the legislature, and judge or pronounce the law, not from the expressions, but from the thoughts of the legislators. This is a *casus omissus*, and can be remedied only by a new law. For such a deficiency, there is a penalty imposed by the eastern inspection law, but none by the western. A supplement is, in all respects, a distinct act from the original. Our inspection law refers to a certain act, which appears to have been passed on a certain day, to wit, 5th April, 1781; and extending this act to us does not extend the supplement also.

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Such is the substance of the arguments on both sides.

It cannot be denied, that the rule, "that divers statutes relating to the same thing ought all to be taken into consideration, in construing any one of them," is a sound rule of construction; in like manner as that all the parts of one statute are to be taken into consideration, in the construction of any one part. So, also, of all the parts of a deed; and so of all deeds relating to one transaction. The whole is considered as one whole, one system, one law, one deed. But this is a rule of construction only, and makes them one, only for the purpose of construction or mutual explanation. It does not mean, that referring to *one* act necessarily refers to *all* acts on the same subject; or that extending *one* act to a district, where it did not operate before, extends all *other* acts on the same subject to this district.

Among other notes read by the plaintiff's counsel, from *Bacon's Abridgement*, the following seems most, or is rather the only one that seems, to support his opinion. "The 13 *El. c. 10*, concerning leases made by spiritual *4 Bac. 646.*

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persons, being enlarged by the 14 *El. c. 11*, although only the former of these statutes be recited in the 18 *El. c. 11*; it has been holden, that the latter is virtually recited therein."

It is dangerous to found opinions on abridgments however respectable. On turning to the case of *Bayley v. Murin*, referred to in this note, the doctrine stated in the abridgment appears to be one of the reasons for a doubt or opinion of only one of the judges, a most respectable one indeed, chief justice *Hale*, but this opinion was contradicted by the rest of the court. On examining the two statutes of 13 *El. c. 10*, and 14 *El. c. 11*, it appears, that the 14 *El.* is, as in the case cited it is called, but a kind of appendix to the 13 *El.* a construction or explanation of its extent: and was made on purpose to define, extend, or limit the sense of it and other statutes, and is intitled "An act for the continuation, explanation, perfecting, and enlarging of divers statutes." The supplement, in the case before us, is an *alteration* of the original law. And to say, that the law of *September, 1791*, by referring to the law of *April, 1781*, referred also to the law of *December, 1781*, is saying, that it enacts different regulations, from those to which it refers.

No authority therefore has been shewn, to justify an opinion, that extending one statute, of course, extends all its supplements, or all statutes on the same subject. A supplement seems to be a separate law; and to extend or repeal it, it must be specially named. This very supplement, which, it is contended, must be considered as extended with the original act, contains in itself a declaration, that it is a distinct law from the original act; for it provides, that "all fines and penalties, herein mentioned, shall be recovered, and applied, in manner and form, as directed by *this act*, and *the act to which this act is a supplement*." And another supplement to this original act, extending the regulations, fines, penalties, and forfeitures of the original act and its supplements, to the cases provided for in this last supplement, provides, that  
 2 *St. L. 3.* "all and every the regulations, fines, penalties and forfeitures, in the *said recited act*, and *the several supplements* thereto, and by *this act*, made, imposed, and inflicted on any persons who should, &c. or should or shall offend against  
 2 *St. L. 714-5.*

the said *recited act*, or *the supplement thereto*, or against *this act*, shall, &c. as if the article was inserted in the said *acts*, or as if the said regulations, fines, penalties, and forfeitures, were herein repeated. 1794.

If the legislature enacting the law of 1791, and referring to the law of *April*, 1781, referred to the law of *December*, 1781, they must have referred also to the law of 1789—and, in both these laws, they must have observed the mode of expression used in the laws, when both an act and its supplement are referred to. And if they turned over the volumes of the acts of assembly, and examined the expressions constantly used in all such references, they would have uniformly found in all the same recital of act and supplement or amendment; and no where, in my observation, would they have discovered, that the legislature, intending to extend, confirm, or repeal, an original act and supplement or amendment, ever confined its expression to the original law only, but always repeated the titles of all the acts to be extended, confirmed, or repealed.\*

If then the legislature which enacted the western inspection law, in referring to the law of *April*, 1781, did not use similar expressions to those used by all other legislatures, in referring also to any supplement, what are we to conclude from this, but that they did not mean to refer to any supplement? Against this uniformity of style in all other laws, I see no circumstances sufficiently strong, from which, in the case of a penalty, to infer an intention of the legislature to extend to the western inspection, the supplements to the law referred to. For us to say, that they intended it, because we may think they ought to have done it, is to make ourselves legislators. And to suffer executive officers, to model or apply to the exercise of their authority, such laws, or parts of laws, as they may think commodious, is too dangerous to be admitted, and is, in fact, making them legislators. If, therefore, the supplement be not ex-

\* St. L. 121-3, 131-8, 307-9, 311-2, 323-7, 333, 343, 358-73, 374, 444-9, 504-9, *Galloway's ed.*—2 St. L. 152, 162-7, 192-4, 221-4, 245-50, 282-7, 347-71, 373-4, 414-8, 493-9, 505-7. *M. Kean's ed.*

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tended to the western inspection, the plaintiff's demand fails. It is better to say, that this case is not provided for, by our inspection law, than to leave inspectors at liberty to pick and choose, out of all the supplements, such parts, as, from their circumstances, *they may suppose* the legislature intended to apply to us. The law was not made for the benefit of the inspectors. And, if those concerned in the flour trade think the law imperfect, let them apply to the legislature for a new law, and a more complete system.

2 *St. L.* 157. In fact our inspection law seems to have been drawn up with very little care. Though in the reference to the original law, the sections providing for covering waggons, shallops, &c. are excepted yet the section inflicting penalties, for the defect of this, is not excepted: and, though the duty is dispensed with, the penalty may be exacted for the neglect of it, with more colour of authority, than for the deficiency which is the ground of this action. Of laws so carelessly penned as little as possible of the meaning ought to be drawn from presumption.

Laws imposing a penalty are sometimes considered as remedial laws. They have been considered as remedial, when the penalty goes to the party grieved. The penalties of these laws are not so applied; and it is the inspector who sues here, not the purchaser or person concerned in the injury, if any injury existed. We know not that there was any fraud, and we cannot intend, that there was. Perhaps the flour was taken and to be delivered by weight, not by the barrel. Perhaps the flour was not to be exported *for sale*. *Elliot and Williams* were and are contractors for the army: it might have been for the use of the army, and, on the delivery there, its quality and quantity would be examined. Our inspection law imposes a penalty on any person exporting flour out of the state, from these counties, by means of the river *Ohio*, before the same be inspected. Suppose an emigrant to *Kentucky* should take in his boat a quantity of flour from these counties, for the use of his family for the year ensuing; and not calling on the inspector to examine it, should be sued for the penalty; would the law be considered as remedial or penal?

*Comm.* 88. I take the case before us to be a penal action, on a



penal law, to be strictly construed. And, in this view, I must declare, that a penalty ought never to be exacted from any man omitting to do what he cannot *clearly* discern to be his duty to do. Were it therefore only *doubtful*, whether this regulation extended to the western inspection, I should think this doubt alone a strong, a conclusive argument against the plaintiff.

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The western inspection law directs the same regulations, "*except as to the stamp on the plugs, which shall be marked with the letters W. P.*" as are prescribed by the act of April, 1781." Now were not the western inspection law carelessly penned, and were it not, in many instances at least, to be considered as a penal law; some presumption might be drawn from this expression, that it was intended to refer also to the supplement of December, 1781. For this expression seems rather to refer to the 5th section of the supplement, than to the corresponding 11th section of the original law.

3 St. L. 156.

1 St. L. 83.

2 St. L. 3.  
1 St. L. 886.

On this ground also of this being a case on a penal law, I cannot consent to apply to it the authority of a decision, in the case of *Williams v. Rougheedge*, which has not been cited. For, though that decision shows, that an act, reviving a principal act, may be held to revive, without naming it, an act explanatory of the principal act; yet it was the case of an insolvent debtor in prison; and an equitable construction was given to the reviving act, in favour of the prisoner's liberty. Here we are called on to strain the construction, to aid the recovery of a penalty.

2 Burr. 747.

On the whole, therefore, my opinion is for the defendant: and let the legislature provide for the omission, by a new and complete system.

## WASHINGTON COUNTY.

September Term, 1794.

PENNSYLVANIA v. JAMES FARREL.

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ON the trial of an indictment for forging and knowingly publishing a note, the person whose note it purported to be was called as a witness.

*H. Ross*, objected to his admission. Under the statute of 5 *El.* the person injured could not be a witness. Our act of assembly pursues the stat. 5 *El.*

*Rex v. Rhodes*  
2 *Str.* 728.  
2 *Hawk.* 611.

PRESIDENT. You may either argue or reserve the point.

They agreed that it should be reserved; and the forgery and publication were proved.

*Brackenridge* for defendant. Unless the court has doubts on the point of competency, seeing the witness has so plain an interest to invalidate his own obligation, I hope the court will instruct the jury to disregard the testimony.

PRESIDENT. I will not do so. The cases on this subject are not very consistent; but I acquiesce in the cases of *Abrams v. Bunn*, and of *Pennsylvania v. Keating*, and hold the witness competent. His credibility lies with the jury.

4 *Burr.* 2251.  
*Dall.* 110.

Verdict guilty.

## ALLEGHENY COUNTY,

December Term, 1794.

PENNSYLVANIA v. ANDREW ROBERTSON.

ROBERTSON was indicted for the murder "of an Indian man of the *Munsey* tribe," on 1st of May, 1794.—

*Robertson* was in the employment of the contractor and in a house of his, at *Fort-Franklin*, and was frying

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meat on the fire. The *Indian* came in drunk, and stepped across the frying-pan, as if to kick it over. *Robertson* bade him go out, and on his refusing, said he would put him out. The *Indian* persisting in his refusal to go out, *Robertson* proceeded to put him out. A struggle ensued, and both fell. *Robertson* got up first, and seized the *Indian's* feet, to drag him out. When he had dragged him as far as the door, the *Indian* seized the door post. *Robertson* called to some present, to part the *Indian* from the door-post. The *Indian* said he would let go his hold. *Robertson*, then let go his hold of the *Indian's* feet. On this the *Indian* kicked *Robertson* with one of his feet in the face, so that the blood run from his nose in a stream. Then the *Indian* got up, and made at *Robertson*, who thereupon seized the bar of the door, which was of cherry-tree, three feet long, about three inches broad, and half an inch thick, and struck the *Indian* with the narrow side of it, on the side of his head, so that he instantly fell and died. The *Indian* was a strong man, of about six feet high, much stouter than *Robertson*. He was standing outside the door, and between *Robertson* and the door. The bar was lying outside the door on the ground. The *Indian* had a knife. The *Indians* generally were, at that time, supposed to be dangerous, so that the people durst not go out of the fort. The *Munsey* tribe, or part of them, were hostile, this man was under strong suspicions, was a *bad Indian*, of no repute among his own people, who thought the killing of him not improper. Such was the case on the evidence.

*Brackenridge* and *Collins*, for the prisoner, contended, that this was but homicide *se defendendo*, and the jury ought to acquit. 1 *Hawk.* 113, 3 *Bac.* 675, 1 *Hale*, 486, 4 *Comm.* 184.

*Galbraith*, for the state, cited 1 *Hale*, 485, 1 *Hawk.* 105, 108.

PRESIDENT. The circumstances proved clear this case of all presumption of malice. The killing therefore is not murder.

Is it manslaughter? It was lawful for *Robertson* to exert as much force, as was sufficient to put the *Indian* out of the house. It does not appear that he used more.



1794. After he had accomplished this, the *Indian* was the aggressor, by kicking *Robertson* with his foot. He was prosecuting his attack, "he made at *Robertson*." He was a *savage*, a *drunk savage*, a *savage* naturally *illdisposed*, armed with a knife, a *stronger* man than *Robertson*; and his *nation* and *himself* were under strong suspicions of hostility. All these circumstances were sufficient to alarm *Robertson* for his own safety, and induce him to arm himself with a stick, to prevent the danger of the *Indian's* attack, and save his own life, by a stroke at the life of the *Indian*.

If you believe, that *Robertson* might have otherwise entered the house, or escaped, and that the blow was given in a mutual combat, without necessity either from the protection of his life, the possession of his house, or his right of entering it, the killing is manslaughter.

If you believe, that there was no other probable way to get into the house, or otherwise escape from the rage of the *Indian*, and the danger of his life, than by the blow given, it is but homicide in self-defence.

Refer 279-91.

If you believe it homicide in self-defence, you may acquit the prisoner on this indictment.

Verdict not guilty.

Lessee of WILLIAM WADDEL v. THOMAS GRAY.

THIS was an ejectment for 302 acres and 18 perches of land in *Plumb* township, *Allegheny* county, on the demise of *Robert Waddel*, of 2d *July*, 1791, to hold from 1st *July*, 1791, for ten years.

The plaintiff shewed a warrant dated 30th *August*, 1785, for 300 acres of land, on the waters of *Thompson's* run, joining lands of *Bernard Dougherty* and others, interest commencing from 4th *March*, 1772; with a survey, made 7th *July*, 1787, on this warrant and an order of the Board of Property of 5th *March*, 1787, containing 302 acres and 18 perches; and a patent, on this warrant and survey, dated 24th *March*, 1792.

He then proved, that *Joseph Creswell*, having a general authority from *David Rogers* to make or buy improvements for him, bought, for a trifle, from *James*

*Myers*, a small improvement, to wit, some trees deadened, got a survey made on it including this improvement and the land in dispute, hired a man to make rails, had about nine hundred made, some more trees deadened, and a cabbin raised to the joists. This was between the years 1772 and 1774. None ever lived on the land, till *Isaac West* came on it, claiming for himself. This was before, or in, the year 1774. He roofed the cabbin, and lived in it; built a house twenty-seven feet long, made a large improvement of upwards of twenty acres of cleared land, and lived on the land till 1778, when he was killed by the *Indians*, the house burnt, and the neighbourhood desolated.

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The defendant shewed a location, No. 3396, in the name of *Eleazer Myers*, dated 13th June, 1769, for 300 acres of land, joining lands of *Jacob Bousman*, about a mile and a half from *Forbes's* breast-works, on the waters of *Thompson's* run, on the right hand branch about four miles and a half from the mouth; with a survey made on this location, 3d December, 1784, containing 352½ acres and allowance, on a branch of *Thompson's* run in *Pitt* township, *Westmoreland* county. Before this survey, *E. Myers* had, on this location perhaps, though that did not certainly appear, made a survey of another tract of land, about half a mile or three quarters of a mile distant from this, and sold it to *Bernard Dougherty*; but one *Beattie* having a prior location for that, *E. Myers* gave up his pretensions, that *Beattie* might obtain his patent, and afterwards, on 3d December, 1784, made the above survey of the land in question, which answered exactly, and better than *Beattie's* land, to the description of this location.

The defendant also proved, that, in the fall of 1772, *Robert Thompson* made an improvement on the land in question, on *Thompson's* run, deadened trees, made brush heaps, marked a tree with his name, and afterwards, and perhaps before *West* was killed, sold this improvement to *E. Myers* for 15l. *Creswell's* improvement was about a quarter of a mile distant, and both his and *Thompson's* were within both surveys made on *Waddel's* warrant and *Myers's* location. In spring, 1785, *E. Myers* put a tenant on the land, who fitted up an old uncovered cabbin, and went into it, under a lease for four years.

1794.

The old improvement was then all grown up. None had lived on it from the time of *West's* death. This tenant cleared and planted nine acres that spring, twelve acres the spring following, and nine the spring after that. *E. Myers* occasionally, from time to time, claimed title, through his location, to the land in *West's* possession. *Isaac Lane*, who came to this country with *West* in 1772, made an improvement a quarter of a mile distant from *West's*, and, together with *West's*, within the survey afterwards made by *Creswell*. In the fall of 1772, or spring of 1773, *Rogers* and *Waddle* came to *Lane*, and he bought *Rogers's* claim for 10l. *E. Myers* was present, and said he would have that or the adjoining tract by his location, but would let *West* live there all his days.

PRESIDENT recapitulated the title and testimony on both sides, and made three questions.

1. Had *E. Myers* a right to lay his location on any vacant land, supposing he had, before, laid it on *Beattie's* land, which is not the land in dispute?

2. On 3d December, 1784, was there any thing to hinder *E. Myers*, from laying his location on the land in dispute?

3. Will the plaintiff's patent, as signifying the will of the proprietor, conclude you from examining the adverse titles, as they stood on 3d December, 1784?

1. The location applies exactly to this land, and would not apply so well to any other. *E. Myers* therefore mistook in his first survey, and got nothing by it; for an elder title intervened. Was he therefore bound by this mistaken election, or might he correct his mistake, and come upon the land which really answers the description in his location? I think he was not bound by his first election, and he might make a new survey on land answering the description in his location, unless, in the mean time, an adverse title, either positive or equitable, had, under the confidence of his first election, attached itself to the land described in the location, afterwards resorted to, and now disputed.

But it is objected, that *Eleazer Myers* had sold to *Dougherty*, and could not then change the application of the location. I answer, this lies not in the mouth of *Waddel*.



2. On 3d *December*, 1784, *Waddel* had no positive strict legal title. Had he then such an equitable title, as was sufficient to exclude the location from this land? I think not. His only title was a cabin unfinished, and rails cut; a mere *improvement* (as to distinguish it from a settlement I will call it) made on a general *land-jobbing* scheme, and never pursued by the maker up to a real settlement. The title of *Francis Waddel* (if it were vested in *Robert*) was but precisely what the title of *Rogers* was. The only actual settlement was made by *West*. But why should *Waddel* derive any benefit from the labour of *West*, rather than the tenant in possession? Surely the tenant in possession has of the two the best right to claim under this labour of *West's*.

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3. The proprietor or Commonwealth, or any other owner of property may give it to whom they please, provided they have not tied up their hands, by a prior engagement, either positive or equitable. But if they have, courts of justice will not suffer them to break through their prior engagement, but will hold them to it. On 3d *December*, 1784, they were bound to *E. Myers*. Therefore the case is to be considered as of that date: and if *E. Myers* had a good title then, he has it yet. He had a good title then.

The jury being at the bar, ready to give a verdict, the plaintiff suffered a nonsuit.

Lessee of DAVID GILLILAND v. DAVID HANNA.

THIS was an ejectment for 300 acres of land on a demise dated 20th *January*, 1793, for five years.

The plaintiff produced a warrant for 150 acres of land on the waters of *Turtle creek*, in *Pitt township*, *Westmoreland county*, joining *John Roadarmer* and others, dated 2d *May*, 1785, in name of *Adam Gilliland*; and a survey on it of 133 acres and 149 perches, made 18th *September*, 1786.

He then offered *Adam Gilliland* as a witness to prove that the warrant was taken out in his name, as a mere trustee, and that *David Gilliland* was the real owner.

1794.

Brackenridge, for the plaintiff. By the regulations of the Land-Office, a man could take out but one warrant in his own name. This is a trust. The title is really in the *cestui que trust*. Why should he not support an ejectment? The case of a trust is out of the statute of frauds.

2 Ventr. 361.
1 Vern. 367.
Dall. 72, 424.

Woods, for the defendant. It is the plaintiff's own fault, that he had not a title, when he commenced this ejectment. The statute of frauds precludes any parole evidence of title.

PRESIDENT. It will be best to receive the testimony, but reserve the point for argument, if there should be a verdict for the plaintiff; and if afterwards, on argument, the testimony should be thought inadmissible, judgment of nonsuit will be entered.

Adam Gilliland then proved, that he did not take out the warrant or pay any money on it; and that, in 1785, he heard *David Gilliland* say, he would take out a warrant in his own name. Another witness proved that *David Gilliland* paid for the warrant.

The defendant produced a location, or order of survey, No. 1486, dated 3d April, 1769, in name of *George Thomson* for 300 acres adjoining *John Fraizer* and *William Powel*, on both sides of *Turtle creek*, about three quarters of a mile from the mouth; and a survey made by *William Thomson* (the father of *George*, and then the surveyor of the district) 17th April, 1769, of 252½ acres, near *Turtle creek*, *Westmoreland county*; and a warrant of acceptance, 2d January, 1788, of this survey made on No. 1486, dated 3d April, 1769; and a patent, dated 2d January, 1788, on this survey, and location No. 1486.

The plaintiff then produced,

1. A release or assignment by *George Thomson* to *John Perry* in fee-simple, dated 23d April, 1784, reciting,—
“Whereas, on 3d April, 1769, *William Thomson* procured an order in my name, for 300 acres of land, situate on both sides of *Turtle creek*, joining *John Frazier* and *William Powel*, which said *William Thomson* conveyed to *Conrod Winemiller*, and whereas said *Conrod* conveyed to *John Perry* and *Daniel M. Clintock*, and *Daniel M. Clintock* conveyed his half to *John Perry*;

now I do assign and release all my right and title to same land to *John Perry* his heirs and assigns."

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2. A conveyance by *William Thomson* to *Conrod Wine-miller*, dated 3d May, 1771, for the consideration of 25l. "of all his right to a certain tract of land situate on both sides of *Turtle* creek, and joining lands of *John Frazier* and *William Powel*, containing 300 acres more or less, being the same granted to me by an order of survey, dated 3d April, 1769, No. to have and to hold, &c. subject to purchase money, &c."

3. An order of the Board of Property, dated 6th January, 1794, "*John Perry* stated to the Board, that two surveys being made of two different tracts of land, on an application of *George Thomson*, No. 1486, dated 3d April, 1769, the right to one of which is vested in him, and that *George Thomson* has obtained a patent for the other tract. And on examining the surveys and transfers, it is thought proper to allow *Perry*, or those representing him, a patent, on payment of the purchase money and fees of office, according to the terms on which said application was entered.

Evidence was then given of an improvement on the land in question, in 1771, made by one *John Hucheson*, who cleared ten acres, had a house and garden, raised grain on it, and lived on it three or four years, after which he lost his senses, and his wife sold the land to *William M^cPatrick*, who lived on it a considerable time, till killed by the *Indians*, leaving a daughter yet alive. His executor put a tenant on it, in 1786, who lived on it two years. Then *Thomson* brought an ejectment against him, and, the executor having no money to maintain the law-suit, the tenant gave up to *Thomson*, and became his tenant.

Woods, for defendant. There are not two surveys on the location No. 1486, but only one made on the land in dispute, on which, as was determined yesterday, *Thomson* had a right to lay his location, waving the land originally intended. And from this survey, made 17th April, 1769, *George Thomson* derives a good title. If he did not, an equitable title is in the heir of *M^cPatrick*, and the defendant may keep possession, till this heir claims it.

Lessee of
Waddle v.
Gray.
Ante p. 248.

Brackenridge, for the plaintiff. The transfer, made by

1794.

William Thomson to *Conrod Winemiller*, of the land described in the location, and referring to it, being notorious in the country was a notice to all men, that the land now in dispute was clear of this location, and might be taken by any other title. Therefore this location being otherwise satisfied, by the land described in it, and now held by the assignee of *William Thomson*, the real owner of the location, *George Thomson*, his son can from this location derive no title to the land in dispute; for an attempt like this, to cover two separate surveys under one location, will not be countenanced.

To suffer *George Thomson* to shelter himself under the equitable title of *McFatricks*, is carrying the title arising from settlement farther than it ever has been carried. The reason why settlements are regarded is that it would be iniquitous to take from a man the fruits of his labour. But that is no reason why the land should not be taken from another man, who never expended any labour on it.

PRESIDENT. It does seem, from the papers produced, and especially from the order of the Board of Property, who had all the means of information, that two surveys have been made by *William Thomson*, on one location; that he sold the land for which the location was taken out, for 25*l.*; and afterwards laid this location on the land in dispute, for which he has since obtained a patent. It is not necessary, at present, to give any opinion on this.

Runninton 15 For it is a general principle, that, if there be, out of the plaintiff, a better title in any man, than the plaintiff's, the defendant shall keep possession against the plaintiff, until the better title appear.

The claim arising from the settlement of a new country, by the permission of the proprietor, is meritorious. *Vesey* 454. Lord *Hardwicke*, in the case of *Penn v. lord Baltimore*, says, that, in cases of two great territories held of the crown, long possession and enjoyment, peopling and cultivating countries, is one of the best evidences of titles to lands, or districts of lands, in *America*, that can be; for the great beneficial advantages arising to the crown, from settling, &c. is that the navigation and the commerce of this country is thereby improved.— Those persons, therefore, who make these settlements,

ought to be protected in the possession, as far as law and equity can.

Courts of justice in *Pennsylvania* have recognized settlements, as equitable titles, or claims of preference.

On 2d *May*, 1785, this land was settled, and *Gilliland* could not take it as vacant land; nor does he derive any claim from the settlement on it. It is iniquitous to take the settlement of another. It was iniquitous in *Gilliland*, to attempt to take it away from the heir of *McFatricks*. The title of *Thomson*, if any, existed previous to *McFatricks*'s settlement. Therefore the iniquity, if any, in *Thomson*, respecting *McFatricks*, is less than that of *Gilliland*: because *Thomson* only prosecutes a title which commenced before *McFatricks*'s equity; while *Gilliland* prosecutes a title which commenced after the equity of *McFatricks*. Whatever *Thomson*'s title may be, *Gilliland*'s is bad, and the defendant is not to be disturbed by it.

1794.

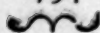
FAYETTE COUNTY,

December Term, 1794.

PENNSYLVANIA v. JOHN MCFALL.

THIS was an indictment for the murder of *John Chadwick*, on 10th *November*, 1794. In the morning of this day, *McFall* was drunk, came to the house of *Chadwick*, who kept a tavern, and got some liquor there. One *Myers*, a constable, came there. *McFall* had expressed resentment against *Myers*, for having taken him on a warrant, and had threatened to kill or cripple him, the first time he met him. When *McFall* saw *Myers* he jumped up, and said he would have his life.—*Chadwick* reproved *McFall* for this. *McFall* rubbed his fists at *Chadwick*, and said he was not so drunk but he knew what he was doing. *Myers* soon went away. *McFall* went out after him, and again said he would have

1794.



his life. *Myers* rode off. *McFall* returned to go into the house again. *Chadwick* bade him go home ; for he had abused several people that day, and had got liquor enough. *McFall* shook hands with *Chadwick*, and went away. *Chadwick* shut the door. About two minutes after, he returned. *Chadwick* rose to keep the door shut. *McFall* jerked it off the hinges ; dragged *Chadwick* out ; and struck him several times with a club on the head.— His skull was fractured by the blows ; and he died the second day after.

H. Ross, for the defendant. Murder in the first degree must be premeditated. *McFall* was drunk, and thereby incapacitated to form any previous purpose of malice. He is only guilty of murder in the second degree, a killing in passion, not of malice. I submit it to the jury on the facts whether it be more than manslaughter.

Galbraith, for the state, argued, that it was murder in the first degree.

PRESIDENT. The malice necessary to make an unlawful killing murder, may be either express, as plain marks of a deliberate design ; or implied, from the aggravated nature and cruelty of the killing.

3 St. L. 599.

It seems to be the intent of our act of assembly to use the distinction between express and implied malice, for the purpose of discriminating between the murder which shall be punished by death, and the murder which shall be punished by confinement to hard labour. Murder committed with malice express, as by poison, lying in wait, or any other premeditated murder, or in commission of rape, burglary, &c. is styled murder in the first degree, and punished with death. Murder committed without previous design, but from implied malice only, as in the heat of passion, and the killing undesigned, though without reasonable provocation, with a weapon likely to kill, is murder in the second degree, and punished with confinement to hard labour.

3 St. L. 601.

Manslaughter, though distinguished into voluntary and involuntary, in other respects remains here as in *England* : so that whatever would be manslaughter there, is here also manslaughter, either voluntary or involuntary : but here involuntary manslaughter may be proceeded against as a misdemeanor.

In this case, the killing is clearly more than manslaughter : for every unlawful killing is presumed murder, unless the person accused can shew such circumstances, as will reduce it to a lower degree of homicide. The defendant has shewn no such extenuating circumstances ; no provocation, no assault ; nothing done by *Chadwick*, to lessen the crime of *McFall*. Therefore the killing is clearly murder.

1794.

What facts constitute one kind of homicide or another, is a question of law purely. Whether the facts exist ; or whether they proceeded from such a purpose ; is to be ascertained by the jury. When ascertained, nothing remains but a question of law to be decided by the court.

The facts here, which stand altogether uncontradicted, amount then clearly to murder. The question is of what degree.

If of the first degree, it must be because premeditated. It cannot come within any other of the definitions of murder of the first degree.

To make it premeditated, it is not necessary, that the design should be *long* formed. If the design of killing be formed previous to the act, I am inclined to believe it is the true meaning of the law, that it is murder in the first degree.

Drunkenness does not incapacitate a man for forming a premeditated design of murder ; but frequently suggests it. A drunk man certainly may be guilty of murder. But as drunkenness clouds the understanding, and excites passion, it may be evidence of passion only, and of want of malice and design. This I leave to you.

If you believe, that *McFall* returned to the door, with a purpose of killing *Chadwick* ; or gave the stroke, with a purpose of killing *Chadwick*, it is murder in the first degree. If he had no such previous purpose, still it is murder, but of the second degree.

The jury found him guilty of murder in the first degree. He received sentence of death, and was hanged.

ALLEGHENY COUNTY,

March Term, 1795.

GEORGE ADAMS v. RODERICK M^CKINNEY.

1795.

2 St. L. 188.

THIS was an action of trespass, for breaking the close of the plaintiff, and treading and depasturing the grass in his meadow. There was evidence that M^CKinney had thrown down the fence, and turned his horses into the meadow. It was proved, that the fence, though not what is called a *lawful* fence, or agreeable to the directions of the act to regulate fences, &c. ; yet was generally what is called a *neighbourly* fence ; and that M^CKinney's horses were *breachy*.

Brackenridge, for the plaintiff. Young, for the defendant.

PRESIDENT. In *England*, the law is a fence round every man's ground, and trespass may be maintained for passing over the uninclosed ground of another against his will. There, as has been stated, on the principle, *sic utere tuo, ut alieno non lædas*, every man must take care to keep his cattle from going on the land of another. In this country our circumstances have led us to suppose, that every man must take care of his land, that the cattle of others go not on it.

It is not necessary now to say, whether trespass could, or could not, be maintained, for treading down *uninclosed* grass, &c. or for treading down grass, &c. inclosed by a fence *notoriously* bad, and such as plainly could not keep off the cattle usually running at large.

The 43d section of the late constitution of this state, which gave general liberty to hunt on uninclosed lands, if it could apply to the case before us, is not in the present constitution.

The act regulating fences gives a new and summary remedy for trespasses on lands, inclosed with fences of the description therein mentioned ; but takes not away any remedy, which existed before and at the time of the passing of that act. The person injured, whose fences are of that description, may proceed under that act, or at common law. And if the fences are not of that description, the person injured, though he can have no remedy under that act, may have remedy at common law.

If fences, though not what are called *lawful*, be what are called *neighbourly*, and sufficient to keep out cattle not *breachy*, I hold, that trespass will lie: for the owners of mischievous cattle ought to keep them from doing injury. But, whatever the fences be, whether good or bad, if a man drive his cattle over them into the field of another, trespass will lie. 1795.

Verdict for the plaintiff, ten dollars.

WESTMORELAND COUNTY.

March Term, 1795.

JOHN KIRKPATRICK v. TURNBULL and MARMIE.

KIRKPATRICK brought an action of *indebitatus assumpsit*, for 86*l.* 2*s.* 8*d.* for goods sold and delivered. There were counts of *quantum valuerunt*; and *insimul computassent*.

An account settled, 26th *June*, 1793, by the plaintiff and *Mr. Marmie*, and signed by *Marmie*, acknowledging a balance of 50*l.* 2*s.* 8½*d.* and an order of *John Probst*, for 16*cwt.* of iron at 36*l.* also due, was given in evidence.

On which there was a verdict for 95*l.* 8*s.* 7½*d.* the amount of the settled account with interest from the settlement.

By consent, this verdict, which was in absence of the defendant, was set aside; and the cause was tried again, at *June* term, 1795.

Woods, for the defendant, objected to one *item* in the settled account, a bill of 100 dollars, drawn by *Peter Marmie*, on his separate credit, on *John Barclay* in *Philadelphia*, and returned protested. One partner can bind the others only in a partnership transaction. We offer to prove, that this order was drawn by *Peter Marmie*, and not by the partnership firm, *Turnbull and Marmie*; and that it was known to be so by the plaintiff, and therefore was not a subject of the settlement of a partnership account.

1795.

*Whitcomb v.
Whiting,
Doug. 652.*

Young, for the plaintiff, contended, that the account having been settled by the partner, as a partnership account, evidence will not now be received, that any part of it was a separate account. An admission by one is an admission by all.

PRESIDENT. The question really is, whether the defendants, as partners, may shew, that the plaintiff took a separate account, known to be such into a partnership settlement; or whether the partner having the separate account, by making a settlement in the partnership name, can conclude the other partners, and make them liable for the separate account. We are clear that the proof is admissible.

Mr. Young was then sworn, and proved, that a protested bill, drawn by *Peter Marmie*, on *John Barclay*, was sent up to him, from *Philadelphia*, to get the money from the drawer; that, by the directions of *Mr. Marmie*, he called on *Mr. Kirkpatrick* for the money, who declined payment (as he then considered himself in advance to the company) till some castings should be sent him from the furnace of *Turnbull* and *Marmie*, which *Kirkpatrick* considered as the fund out of which he was to advance the money; and that *Kirkpatrick* afterwards paid the money.

PRESIDENT. The settlement is, *prima facie*, evidence of the balance being due by the company to the plaintiff. But it is not always conclusive; and the other partners may shew, that the plaintiff has taken a separate account of the settling partner into the settlement.

If *Kirkpatrick* advanced this sum of 100 dollars to *Mr. Young*, in payment of *Marmie's* debt, on the credit of *Marmie* alone; it cannot be received as an *item* in the partnership account, and must be struck out of the balance. For the plaintiff and the settling partner have no right to make the company pay the settling partner's debts.

But if *Kirkpatrick* paid this sum of 100 dollars, by the directions of *Marmie*, an acting partner of the company, as a payment for castings received from the company; it is a payment to the company. For they entrusted *Marmie* with the sale of the castings, and the receipt and application of the money arising from such sale.

The jury found for the plaintiff, as before, for the amount of the settled balance, with interest.

1795.

GEORGE ARMSTRONG v. WILLIAM M'GHEE.

ARMSTRONG appearing disgusted with a valuable horse, that, after a hard ride, seemed jaded and lame, offered him for sale to several persons, for a trifle, and to M'Ghee, for 5*l*. M'Ghee agreed, and by Armstrong's direction, took the horse home to his stable. Both lived in Greensburgh, and were on terms of intimacy. At the time, some supposed Armstrong in jest. He said so himself afterwards, and demanded the horse back, as supposing M'Ghee understood him to have been in jest. However M'Ghee chose to keep the horse; and Armstrong brought a replevin for him. M'Ghee claimed property, and retained the horse. During the suit, the horse died, having been very hard ridden, in a hot day, and drunk cold water.

Brackenridge and Young, for the plaintiff. A contract must have an agreement of the mind, understood by both parties. Inadequacy of price, known to the other party, is a ground to set aside a contract. So is imposition, as selling a horse for a barley corn for the first nail, in his shoes, and so in a duplicate ratio for every other. A contract to be carried into effect, must be fair, reasonable, and free from circumvention.

1 *Powell Contr.*
6 *Es.* 330.

Purviance and H. Ross, for the defendant.

PRESIDENT. A contract may be made by any signs, which shew an agreement of mind, though there be neither words nor writing: if there be understanding, it may be made between two men deaf and dumb.

There is a difference between carrying into effect an incomplete contract, and annulling a complete one. When a court of Chancery is called on for its aid, to carry into effect an incomplete contract, they will, before they give that aid which the complainant requires, compel him to do equity. If Armstrong had been over-reached, and the contract incomplete, perhaps a court of equity would not carry this contract into effect.

1795.

Here is a complete contract; and the question is not, whether it shall be carried into effect, for that has been done already; but whether it shall be annulled, and the parties brought back to where they were, before it was made. Did both parties understand it as a binding contract? Though *Armstrong* did not, and though *McGhee* knew that he did not; if he gave no signs to *Armstrong*, that he did not understand it as a binding contract; why did *Armstrong* trust him? And if he trusted him, why should he come here now, to save himself from the consequences of such gross folly? Is it for wanton and idle purposes, like this, that you and we sit here? It is one thing, whether *McGhee* has acted ungenerously, unneighbourly, and unhandsomely; and another thing, whether he has acted illegally, so as to raise no obligation, or vest no right. This contract, as far as signs and all the formal parts of a contract can go, is complete: and, if there be no fraud, I do not see how it can be annulled. If *McGhee* gave *Armstrong* ground to believe, that he considered this contract, which to all appearance is a complete one, as a mere sham or jest, conveying no right; he must take it as he then gave signs that he understood it, and remain a mere trustee to *Armstrong*, and bound to deliver up the horse when required. In this case he never had any right: the horse continued to be the property of *Armstrong*: and so you will now say.

As to damages, it is proper to consider what the one party lost, and what the other gained.

The jury after sitting for the remaining part of the day, and the whole of the succeeding night, were sent for into court next day, and not having then agreed on a verdict, they were discharged by consent.

At next term this cause was tried again; and a verdict was found for the plaintiff for 8*l*. damages.

PENNSYLVANIA v. JAMES MONTGOMERY.

A WRIT of *habeas corpus*, for *Catharine*, a mulatto woman, having been directed to *James Montgomery*, he returned, that he claimed her as a servant under an indenture, dated 7th November, 1777; by the overseers of the poor of *Leacock* township in *Lancaster*

county, with the consent of two justices of the county, binding her, as the child of a woman an indented servant of his, to him, till the said mulatto child, born 8th September, 1775, should accomplish her full age of thirty-one years, according to law.

1795.

Brackenridge, for the master. This indenture is executed by virtue of the act for the better regulating of *Negroes*. The binding of the overseers is conclusive, that all the necessary requisites for giving them authority existed at the time; and the existence of those requisites is not now traversable. Many acts of justices, as convictions on view, &c. are records, and not traversable. No man would take a servant, if, after twenty years, the ground of the binding were traversable; and thus the law, intended to preserve the blood from commixture, would be entirely defeated. The law requires not only the agency of overseers, who are mere ministerial agents, but of justices of the peace, who are judicial officers. This shews an intention to make their joint acts conclusive. 1 St. L. 145.
O. Ed.

Young, for the woman. The act has a variety of objects in view, The 8th section is the material one. It enacts that if any white man or woman cohabit or dwell with any *Negro* under pretence of being married, the child or children of such white man or woman shall be put out to service until they come to the age of thirty-one years. It gives no power to record a conviction. The courts had this power. In some other cases in this act, single justices have powers. 1 St. L. 145.
O. Ed.

There ought to have been a previous conviction in the county court, and, in consequence of that, with, or perhaps without, an order of the court, the overseers could bind. Then the proof could, at any distance of time, be given. The binding is in consequence of the conviction, and is a part of the punishment.

Here the innocent offspring is bound by the act of mere executive officers. This is such tyranny as can exist in no free country. Indeed the law is now repealed. 1 St. L. 342.

Were the construction contended for to be held good, it would be easy for the overseers to pick up and bind any helpless mulatto child. Shall not this be enquired into?

1795. The authority is merely ministerial, and must be subject to control. The subject requires the solemnity of a court of record.

Commissioners of bankruptcy have powers like a court of record. They may imprison, &c. ; yet their acts are traversable.

In most cases of summary convictions, forms of conviction are prescribed ; why did not this act prescribe a form, if it was intended that any act out of court should be conclusive ?

The law is careful of the person and interest of minors. It appoints guardians for them.

A conviction is necessary to recover the fine of 30*l.* under this section ; *a fortiori*, to bind the innocent child. The court will surely not presume what ought to be established by a conviction.

The indenture does not even set out the necessary requisites : it says not, that the father and mother *lived together under pretence of marriage*. The overseers therefore shew no authority. It may have been an ordinary binding of a helpless orphan, and good only till 18 years of age. The petitioner has already served 19 years ; and that is sufficient to indemnify the master.

Brackenridge. There are two parts of the punishment of the offence against this act ; one is the fine of the parents, another the servitude of the child. There is no reason, why, because the state has not prosecuted for the one, the overseers may not exercise their part of the duty. The two things are entirely separate. The acts of a justice of the peace are frequently conclusive ; as in cases of debt under forty shillings, and in many convictions for the breach of penal laws.

We are to consider this case, as if it were discussed the day after the binding, with all the prejudices then existing. The binding was not traversable one hour after it was completed. If traversable then, I admit, it is traversable now.

PRESIDENT. Overseers of the poor have a right to bind out children, who have none to provide for them, till, if females, they arrive at the age of 18 years, or, if males, at the age of 21 years ; when, it is presumed, they can provide for themselves. This indenture is good till eighteen.

It is a settled point, that one man is not bound by the act of another, except as to rights claimed under that other. A verdict, &c. between two may be traversed by a third person affected by it.

1795.

This woman, arrived at an age to provide for herself, calls for the authority of the master or the overseers, to keep her longer in servitude. No authority is shewn, but the indenture. That, of itself, is not sufficient, for a longer term, than till the woman bound arrives at the age of eighteen.

The woman was discharged.

FAYETTE COUNTY.

March Term, 1795.

WILLIAM BETTS v. GEORGE DEATH.

THE parties went down the *Ohio* river, to the *Cumberland* river and the *Southern-Territory*, on a joint trading adventure, with whisky, flour, cider, &c. Disputes arising between them, there was a reference to arbitrators, and an award in favour of *Death* and a suit before a justice, and judgment for 20*l. proc.* money, in favour of *Death*. They quarrelled; *Death* beat *Betts*, and, to avoid an arrest in that territory, hastily left it. After his departure, *Betts*, who was to remain and settle in the territory, brought a foreign attachment on his claim in their traffick, and, having prosecuted it to judgment, in the court of *Davidson* county, brought an action here of *indebitatus assumpsit* on that judgment, for 15*l.* 13*s.* 11*d.* money of that territory, equal to 15*l.* 13*s.* 11*d.* money of this state.

A copy of the record was offered, containing a proceeding in a foreign attachment, in the court of *Davidson* county, at the town of *Nashville*, in the *Southern Territory*, reciting a *capias ad respondendum*, a return *non est inventus*, a foreign attachment, and summons to garni-

1795.

shoes, their appearance, and confession of property, one of ten shillings, and one of a dollar ; judgment, that a plea of the defendant, entered by his attorney, was in error and void, because not having replevied, he could not plead to issue ; then proclamation for the defendant to come in and replevy ; and, he not appearing, a judgment by default, a writ of enquiry, and damages found 10*l.* 1*s.* 3*d.* and costs 5*l.* 12*s.* 8*d.*

Young, for the defendant, objected to this. A judgment on a foreign attachment is no proper evidence, as a foreign judgment. It is merely a proceeding *in rem*. The appearance of an attorney is without the knowledge of *Death*, and is void by the opinion of the court in which he appears.

1 St. L. 60.

Phelps v.

Holker,

Dall. 261.

M Glennachan

v. M'Carthy,

Dall. 375.

PRESIDENT. A judgment in a foreign attachment is not conclusive, but may be examined into. It is proper evidence in this case.

The record was then read.

PRESIDENT. A judgment in an action to which the defendant has appeared in a court of competent jurisdiction, is, with an exception of a foreign court, conclusive on the parties to it. A judgment in a foreign court is, *prima facie*, evidence, but may be disproved. Perhaps the judgment of a court of another state ought not to be considered as a foreign judgment. An attachment is *in rem*, not *in personam*. So far as the property attached, it is conclusive, under the precautions and provisions of the act of assembly ; beyond the property attached, the judgment may be questioned. So far, it corresponds with the views of justice and of the act of the assembly. Beyond that, making it conclusive would be contradictory to the rights of natural justice, which require that no man shall be condemned unheard, or be affected by a judgment, to which he was not a party, and had no opportunity of answering.

You will consider whether the evidence given invalidates the recovery of the sum found by the jury of inquiry on the foreign attachment, and the costs, which are both included in the judgment stated in this declaration.

Verdict for the plaintiff 14*l.* 14*s.* 7*d.* damages.

Young, for the defendant, moved to set this verdict aside, on the ground, that the proceedings on a foreign

attachment, in the *Southern Territory*, ought not to have been received in evidence of a debt; and on an affidavit, that in common dealings and public proceedings in that territory, when any sum of money was mentioned, *proc.* money is meant, and that was rated at two for one. 1795.

The verdict was set aside on the last point.

And, at *September* term, 1795, this cause was tried again; when, the evidence of the reference and hearing both parties on it, and of the award, appearing more strongly for the defendant, the jury found a verdict for him.

PENNSYLVANIA v. JOHN GILLESPIE.

GILLESPIE was indicted for unlawfully, forcibly, and contemptuously, tearing down, and contemptuously refusing to replace, an advertisement, set up by the commissioners of *Fayette* county, of the sale of lands there for arrears of county taxes.

PRESIDENT. For taking down an advertisement of a sale of property for private use, an action would, in my opinion, lie for contingent damages. It seems to follow, therefore, that, when the sale is under a public law, for public use, an indictment should lie for the injury done to the public. *Weller & al v. Baker, 2 Wils. 414.*

He was convicted.

WASHINGTON COUNTY,

March Term, 1795.

JAMES CAMPBELL v. JOHN CANON.

CANON gave *Campbell* a bond for the payment of money, with a warrant of attorney to confess judgment. A judgment had accordingly been entered, and, a year and day having expired without any execution, a

1795. *scire facias* was issued ; but, to get an execution more quickly, this was discontinued, and another judgment entered on the warrant annexed to the bond, and execution on this second judgment was issued. And now a motion was made to set aside this second judgment, and the execution on it, as irregular.

PRESIDENT. We think this warrant of attorney authorised the entry of only one judgment, and was satisfied by the entry of the first judgment. The second judgment, and the execution on it, must, therefore be set aside as irregular. But we hope the defendant will consent that the discontinuance of the *scire facias* be also set aside, that the plaintiff may proceed thereon to recover his money.

This was agreed to.

Ex parte WILLIAM M'DONALD, an insolvent debtor.

1 St. L. 275. **R**O S S, for the plaintiff, in the suit on which M^cDonald was in custody, objected to the discharge of the prisoner ; because he had not resided within this state two years next before his imprisonment.

Pentecost, for the prisoner. The law was made to prevent inhabitants of another state from coming here and becoming resident in order to receive the benefit of the insolvent laws here, which perhaps they could not obtain in the state whence they came. But this prisoner was an inhabitant of *Virginia*, at the time of the arrest, and of the contract, and long before. He had, before his arrest here, been arrested for the same demand in *Ohio* county where he resided, and the suits there were discontinued, after his arrest here.

PRESIDENT. As the circumstances of this case carry no appearance of collusion, or fraud on the law, on the part of the prisoner, but rather of oppression by the plaintiff, we think it fair to construe the 4th section of the insolvent law of 1731, in the manner contended for by the prisoner's counsel, and, of course, to consider the prisoner as not within the evil provided against, by that section.

1 St. L. 275.

See 2 St. L.

688-9.

3 St. L. 181,

472-3.

FAYETTE COUNTY,

June Term, 1795.

PATRICK ELLIOT for the use of JONATHAN HILL
v. SAMUEL MILLER.

JOHN SUNTLIN gave a single bill, dated 25th March, 1786, for the payment of 25l. to Samuel Miller, or his order, heirs, or assigns. Samuel Miller assigned this bill to Patrick Elliot, by an indorsement on it, as follows, "I assign over my right and title to the within note to Patrick Elliot" (then interlined with other ink) "for value received, witness my hand and seal, this 25th March, 1786, Samuel Miller," (with a seal annexed.) To this assignment, three other names were added, probably intended as witnesses, but a seal was annexed to each name. This note being afterwards assigned without seal in the presence of two witnesses, this action of covenant was brought against the original obligee, the first assignor, on his assignment. The declaration, stating the note, and also, the money being unpaid, the assignment to Elliot; stated a covenant by Miller, that the money should be paid, and an averment, that it had not been paid by Suntlin, whereby action accrued to Elliot, to demand of Miller, the said sum of 25l. It then averred a demand on 1st October, 1786, and a refusal.

1795.

Young, for the defendant, referring to the case of *Cummings v. Lynch*, with the cases therein recited, objected, that the assignment, containing no express promise, that the money should be paid, was not evidence to support this declaration on an express covenant. Dall 444.

The plaintiff suffered a nonsuit.

WASHINGTON COUNTY,

June Term, 1795.

WILLIAM KERR v. JAMES WORKMAN.

1795.

THERE was a dispute between the parties about the property of two hogs, which both claimed, and *Kerr* killed. At *December* sessions, 1792, in *Washington* county, *Workman* procured a bill of indictment to be sent up and found against *Kerr*, for stealing the hogs. When, at a subsequent sessions, this indictment was proposed to be tried, the attorney for the state gave up the prosecution, declaring that the evidence would not support an indictment for larceny, however it might support an action of trespass; and he entered a *nolle prosequi*. *Kerr* then brought an action on the case for a malicious prosecution. At the trial of this action, it was proved, that, before the bill for larceny was sent up, *Workman* had been repeatedly informed by the attorney for the state, and by others to whom he applied, that an indictment was not the proper remedy, but an action only; yet he persisted in prosecuting for stealing.

PRESIDENT. As it has been said, that in an indictment for murder, I will say, that in a declaration for a malicious prosecution, or in stating, that expresses malice is necessary generally to support it, I apprehend the word *malice* has a technical meaning, and is not to be considered, as in the common conversation or classical sense. Any prosecution carried on knowingly, wilfully, and wantonly or obstinately, for no purpose or end of justice or redress, but merely to the vexation of the person prosecuted, I conceive to be malicious.

The finding of the grand jury, that a bill is true, ought not to be considered as sufficient to shew probable cause, if such finding was on the evidence of the defendant in this action.

Verdict for the plaintiff, 12*l.* 10*s.*

JAMES HOOK v. EDWARD ROBISON.

1795.

THIS was an action of *indebitatus assumpsit* for 50*l.* had and received.

Young, for the plaintiff, offered to prove, that *Hook* and *Robison* exchanged horses, *Hook* giving with his horse 8*l.* That, it afterwards appearing, that the horse which *Hook* had received from *Robison*, having been stolen from one *Rhinberger* in *Maryland*, was reclaimed by him, *Hook* had given him up to the owner, and now brought this action, to recover the money which he had given to *Robison*, and also the further sum of 26*l.* *Virginia* money, which, he proposed also to prove, *Robison* had afterwards received, for the horse he got from *Hook* and sold to another.

Woods and *Purviance*, for the defendant. The action is for money had and received, we cannot admit evidence of a horse had and received.

PRESIDENT. The evidence is clearly proper and must be admitted.

The evidence was then given, as stated.

Woods. The plaintiff, having given up the horse to *Rhinberger*, without any verdict or suit, has no right to call on the defendant now for the value of him; as it has never been established, that the defendant had not a good title to him, at the time of the sale. No man's property shall be taken from him, but by trial by jury. Were it otherwise, the plaintiff's cruel and indelicate treatment of the defendant, in having him indicted for a felony of which he was acquitted,* ought to prevent any recovery by him, and subject him to the costs of the prosecution. The acquittal on this indictment is evidence, that the defendant had the property of the horse.

Young, for the plaintiff. *Hook* had his option to contest the property of the horse with *Rhinberger*, or give up the horse, and sue *Robison*. We are not now trying an action for a malicious prosecution.

* *Robison* had been indicted in *Washington* for stealing *Rhinberger's* horse, and acquitted, chiefly for want of *Rhinberger's* testimony to prove that the horse was really stolen; so that it appeared only that he was claimed by *Rhinberger* as stolen from him.

1795.

PRESIDENT. 1. It is true, the plaintiff might have kept the horse, till *Rhinberger* compelled him by law to give him up. But then he must have run the risk of paying the costs of that law suit, and of never recovering this additional loss from *Robison*. His not taking this method is no injury to the defendant; for he may now prove, that the horse was his; and, if he do so, *Hook* will recover nothing.

2. You ought not, in this collateral action, to punish *Hook* for a malicious prosecution. *Robison* may seek his remedy for that, and if he think it proper, perhaps yet will. If he do, *Hook* must answer or pay for it. Now, he is not obliged to explain it. Your making him pay now, might be making him pay twice.

ON CERTIORARI.

PROCEEDINGS of a justice of the peace in three or four actions for debts before him, having been removed by writs of *certiorari*, the judgments and proceedings were set aside; because the summonses did not state any day, on which the defendants should appear before him.

ALLEGHENY COUNTY,

September Term, 1795.

Lessee of JAMES HAMILTON v. ANDREW M'CULLOCH.

THIS was an ejectment for 306 acres in *Versailles* township, *Allegheny* county.

Woods, for the plaintiff, shewed a warrant to *James Hamilton*, dated 16th *July*, 1787, for 300 acres of land, called the *Whiteoak-Level*, adjoining lands of the heirs of *M^cKee*, deceased; a survey on this warrant made 11th *October*, 1787, of 306 acres and 133 perches, and the allowance; and a patent dated 11th *March*, 1788. He then

shewed a deed from the sheriff of *Westmoreland* county, (which then included the land) dated 2d *August*, 1785, to *James Hamilton*, for 300 acres of land sold for 53*l*. on an execution against *James Thomson*, joining lands where *James Thomson* lives. This is the same land for which the patent was given on the warrant and survey, and is the land now claimed by the plaintiff. 1795.

It was then proved, that this land, which was known by the name of the *Whiteoak-Level*, had been claimed by *James Thomson*, and sold, as stated, to *Hamilton*, on a judgment against *Thomson*, in *Westmoreland* county, in which the land then was. When *Hamilton* bought the land from the sheriff, he asked *John M'Kee*, (who lived near the land, and from whom *M'Culloch* derives his title) what he thought of the land, whether it was good, and whether there was any dispute in it. *M'Kee* told him it was good, there was no dispute in it, it had always been known as *Thomson's*; and offered his service to *Hamilton* in renting or selling it. Afterwards a friend of *Hamilton's* hearing that *M'Kee* intended to take a warrant for this land in his own name, got an application and certificate made out in the name of *Hamilton*, and sent them down to *Carlisle*, where *Hamilton* lived, advising him immediately to take out a warrant. It was further proved, that adjoining this land, and the land on which *John M'Kee* lived, one *Goban*, brother-in-law of *M'Kee*, had, in 1770, made a settlement, and lived on it twenty-one years. *Goban* never claimed any part of the *Whiteoak-Level* tract, round which there were old lines, though there was no improvement on it. *John M'Kee* his father, and brothers, claimed the other land round *Goban's* farm, so that his claim was circumscribed to about sixty or seventy acres. This *Goban's* heirs sold to *John M'Kee* in 1786, for 25*s*. per acre. *M'Kee* went round *Goban's* claim, and found the lines between it and the *Whiteoak-Level* tract. *Goban's* improved land does not touch *Hamilton's* lines. In 1788, *M'Kee* took out a warrant in the name of *Hugh Goban*, and on it surveyed the *Whiteoak-Level* tract, together with *Goban's* claim; and afterwards sold part of the land to *M'Culloch*.

Young, for the defendant, shewed a warrant to *Hugh*

1795.

Goban, dated 22d *February*, 1788, for four hundred acres, including an improvement, joining lands of *John M'Kee*, *James Thomson*, and others, in *Huntington* township, *Westmoreland* county; a survey of three hundred and seventy-four acres, and twenty-four perches, made 19th *March*, 1788; a patent dated 8th *June*, 1788; a conveyance from *Hugh Goban* to *John M'Kee*, for 78l. dated 29th *June*, 1788; and a conveyance from *John M'Kee* to *Andrew M'Culloch*, of two hundred and twelve acres, dated 20th *May*, 1789.

Young, contended, that *M'Culloch*, as a *bona fide* purchaser without notice ought to be maintained in the possession of this land.

PRESIDENT. There is no evidence, that the disputed land was ever within the claim of *Goban*: it was always in the claim of *Thomson*. *Goban* might confine his claim within as narrow bounds as he pleased. He did confine himself, on the side next the *Whiteoak-Level* tract. What claims he might have, or how he might urge or dispute them, on any other side, or how much he might have sold to others, we know not. It seems he sold to *M'Kee* 60 or 70 acres, and never claimed any part of the *Whiteoak-Level* tract. *Hamilton* bought the only claim then known to it. He had a right to take out a warrant for it. He took out the first warrant for it. His title is complete. *Goban* had no equitable title to it. And *M'Kee's* legal title, being posterior to *Hamilton's*, is void. *M'Culloch*, therefore, purchased a void title, and whether *bona fide* or not, can derive no right under it.

Verdict for the defendant.

PENNSYLVANIA v. NORRIS MORRISON, CHARLES CRAIG, ADAM CRAIG, JOHN M'WILLIAMS, THOMAS WHITE, HUGH TORRENCE, ALEXANDER M'COMBS, and PATRICK PRESTON.

THESE men were indicted for having, on 18th *August*, 1794, unlawfully, riotously, and routously assembled together, to disturb the peace, and, in *Market Street* in *Pittsburgh*, raised a pole or standard, called a

1795.

liberty-pole, in defiance of the laws of the state of *Pennsylvania*, and of the *United States*, and as an indignity and insult to the honourable *James Ross*, *Jasper Yeates*, and *William Bradford*, Esquires, commissioners on behalf of the *United States of America*, and the honourable *Thomas M'Kean* and *William Irwin*, Esquires, commissioners on behalf of the state of *Pennsylvania*, to confer with the citizens of the counties west of the *Allegheny* mountains; to the great disturbance of the peace, and to the ill example of others.

Woods, for the defendants. These men acted under force, as those had done, who went from *Pittsburgh* to the meeting at *Braddock's-Field*. They had no view to oppose the government. Many did not sign the terms of amnesty, because they supposed themselves innocent. It was not the intention of the defendants to oppose the laws, but to save the town from violence.

PRESIDENT. *Thomas White* must be acquitted: there is no evidence against him. *John M'Williams* has signed the amnesty.

You have no evidence of any constraint from a mob from the country, but in the declarations of the defendants themselves. This is not like the case of *Braddock's Field*, where five or six thousand men were assembled, and threatened the town. There must be first some evidence, that violence was threatened, and danger existed, to the town, before they can found any excuse for their conduct, on this ground.

Pole-raising was a notorious symptom of dissatisfaction, and the exhibition of this, in the only part of this country, where government was supposed to have strength, must have made an impression very unfavourable to the whole country, promoted violence in the people here, and induced force on the part of government.

All the evidence of their acting under duress, is their saying so. It is, at least, as probable, that this was a cover for their real motives, an opposition to the civil authority. Why did not these men sign the amnesty, when almost every man besides in the town signed it? They surely refrained not from a consciousness of innocence. It is somewhat singular, if danger then existed, that the only men in this town anxious for its safety,

1795. were men of little or no property in it ; and that then all the men of property were against this measure. When there was real danger, all the town went to *Braddock's-Field*.

The act of raising a pole in the street is itself unlawful, independent of any other ill intention. The probability is, that the intention was an unlawful opposition to the government, and that the excuse was feigned, to cover their real designs.

Verdict guilty, except as to *White* and *McWilliams*.

SAMUEL BARR v. DAVID HILL.

THIS was an action on a promise to give the plaintiff an hundred acres of land, a cow, and plow-irons, if he would marry *Isabella Hill*, his niece. The marriage took place, against the will of the woman's father. And the promise was proved in substance, partly from conversations before, and partly from declarations after the marriage.

Ross, for defendant, contended that the promise was not binding.

PRESIDENT. The contract is valid, the consideration good, and the conduct of the defendant faithless and immoral. You will consider his declarations as explanatory of his contract made with *Barr*. Damages ought to be such as may compel a specific execution of the agreement.

Verdict for the plaintiff, 150*l*.

WESTMORELAND COUNTY,

September Term, 1795.

PENNSYLVANIA v. JACOB CRIBS, DANIEL HAROLD,
and eleven others.

THEY were indicted for a riot, committed 3d September, 1794, in besetting the doors and windows of the house of *Simon Drum*, in the town of *Greensburgh*, throwing stones, &c. at the doors and windows, with intent to beat, wound, tar and feather, and evilly intreat *Jasper Yeates* and *William Bradford*, commissioners on the part of the *United States*, and *Thomas M'Kean* and *William Irwin*, commissioners on the part of the state of *Pennsylvania*, to confer with the citizens west of the mountains.

1795.

PRESIDENT recapitulated the testimony, and distinguished between those, against whom there was evidence, and those, against whom there was not.

Collecting a party, for any purpose of a violent tendency, so directly leads to mischief, that it renders the authors guilty of all consequences plainly to be foreseen.

A report had generally prevailed, that the commissioners, on their return, would be chased out of the town.

This was told to *Cribs* and his party. They were urged to assist in it. And, after all, proceeded, in a body, at the dead of night, to the house where the commissioners slept. For what purpose could they go?

Acts of extreme violence, as robbery, are often committed under a very civil appearance.

No matter how reluctantly a man commits a crime, it is still a crime, though less aggravated.

It is a riot, if a number of people assemble in a town, in the dead of night, and by noise or otherwise, disturb peaceable citizens.

If persons assemble together, for an unlawful purpose, every man is guilty of all acts done in execution of, or contributing or tending to, that purpose. If they meet, for a lawful purpose, and proceed to an unlawful act, it is a riot.

Nine were convicted, and four were acquitted.

FAYETTE COUNTY.

September Term, 1795.

JOHN MULLEN v. NOAH RIDGEWAY.

1795.

ON the trial of an action on the case, *indebitatus assumpsit*, for work done, &c. There was evidence given of work done, and of the sale of a horse, in *New Jersey*; and also that *Ridgeway*, while in prison for debt, in that state, having petitioned for relief, under the insolvent law of that state, gave in a debt due by him, on an unsettled account, to *John Mullen*. This was in *February*, 1786, and the action was brought to *March* term, 1793. *Ridgeway* was discharged under the insolvent law; and, soon after, left the state of *New-Jersey*, and came into this country. The plaintiff continues to live in *New-Jersey*.

1 St. L. 95.
Robison vs.
Bland,
 2 Burr. 1077.
 3 Esp. 152.

Ross, for the defendant, relied on the plea of the statute of limitations, and stated that every man must recover, according to the laws of the country where he sues.

Purviance, for the plaintiff, relied on the exception, which, he contended, applied to persons going out of the state, to reside.

PRESIDENT. It will be best to reserve this point, and let a verdict be taken for the plaintiff, subject to a nonsuit on the reserved point.

This was done. And, at a subsequent term, judgment was given for the plaintiff on the verdict, not only on the ground of the defendant having left the state, where the transactions between the parties had been; but because the defendant, on his petition for discharge by the act of insolvency, had stated himself as a debtor to the plaintiff; and because it would be hard to oblige creditors, after such discharge, to commence and renew actions every five or six years, merely to keep the debt alive, though there was no prospect of getting property of the debtor's. It would seem proper, after an insolvency, to suspend the limitation of actions, to be brought by all creditors returned on the petition, till the debtor was notoriously to his creditors in a solvent state.

WASHINGTON COUNTY.

January Term, 1796.

PENNSYLVANIA v. SAMUEL LEWIS, CHA. HOBBS,
ISAAC HOBBS, NATHAN LEWIS, and ISAAC
BRADEN.

THIS was an indictment for the murder of *John Weston*. 1796.

On the 5th November, 1795, there was a wedding at *Weston's* house. The prisoners went there without invitation (except as to one of them). *Weston*, who seems to have entertained some suspicions of them, told them, they were welcome, if they behaved themselves well.— Nothing improper appeared till the evening, when the company were dancing in an out-house. Then the prisoners began to be troublesome; shoved the dancers off the floor; fought sham-battles among themselves; and broke up the company. They stood in a row against *Weston*, who was an old man of seventy-three years of age; and, pushing one against another, pushed him against the wall. He complained that he was hurt; and desired them to desist. They seem to have done so then, but to have repeated this conduct, or something like it several times; and the old man was several times thrown on the floor; and, at least once, they seem all to have fallen above him. *Weston* left the out-house, and came into the dwelling-house, and shut the door. They burst it open with violence against the side of his head; came in, and mocked *Weston*; pushed him and his wife off chairs;— and, after they went out of the house, threw stones, &c. in through the openings, and down the chimney. The old man again went out to remonstrate with them; and, when he returned into the house, said *Isaac Braden* and *Isaac Hobbes* had thrown him down off his porch, and kicked him. They seem to have continued there all night, and part of next day. In the morning of next day *Weston* walked about as usual, but occasionally lay down on his bed, and complained of being sore. In the even-

1796.

ing he went to bed, and continued in it. That evening and the second day, he complained "that his inside was *battered to a jelly*, by the kicks and bruises given him by those fellows," meaning the prisoners; spit blood; was altogether unable to rise, ate nothing from the time of the beating, and drank nothing but water; and on the third day he died. The prisoners stuck together as a party by themselves, and seemed all equally to participate in the acts of violence. There were marks of bruises on one side and thigh of *Weston*.

Campbell, Pentecost, and Brackenridge, for the prisoners, made two questions.

1. Was the death occasioned by the acts of the prisoners?

2. Were those acts done with the premeditated intention of causing the death of *Weston*.

1. The cause of the death is altogether doubtful, whether intoxication, old age, or violence. If it be doubtful, you will acquit.

2. These men did nothing more than an usual frolic, according to the custom and manners of this country.

3 *Bas.* 665,
677.

There was no intention of hurt, no design of mischief, in which the malice, which is a necessary ingredient of murder, consists.

The act of assembly distinguishes murder into two degrees. It is not murder in the first degree; for there is no evidence of any previous intention of killing. It is not murder in the second degree; for there was no malice, no intention of injury, and the unlawful act was not a felony, but a trespass, and the killing therefore is no more than manslaughter.

4 *Comm.*
192-3.

In either way, therefore, the prisoners must be acquitted of murder. If their acts did not occasion the death of *Weston*, they are clear of all crime. If it be doubtful whether their acts occasioned his death, the common presumption of innocence will lead you to acquit. If their acts did occasion his death, and though their acts were unlawful, yet, being no felony, but a trespass, and without malice or intention to hurt, it is not murder. So that, at most, it can be but manslaughter. But, I think, you will say, it was not even that; but that the death was the consequence of intoxication, and the infirmities of age. His wife died in a day or two after

him. The prisoners might as well be indicted for murdering her.

1796.

Young, for the state, recapitulated and observed on the testimony accurately and minutely.

It is clear, that the death of *Weston* was occasioned by the violence of the prisoners. You have heard, that *Geoffry Lewis*, brother of two of the defendants, saw the dead body with the bruises on it, and expressed his apprehensions, that these men would be hanged. Why did they not bring him forward.

We have no custom in this country of killing old men at weddings. The *Indians* have a custom of killing one another when drunk; and if we indulge such practices, as have appeared in this case, we shall soon be as barbarous, as the savages of the wilderness.

He who wantonly does an unlawful act, likely to occasion the death of another, is guilty of murder. Malice is a heart regardless of social duty, and fatally bent on mischief.

The prisoners came to *Weston's* house, and were hospitably received. But instead of having their hearts softened by such kindness, they continued their abuse of a poor old man, in his own house, against his repeated remonstrances, till by the violent and repeated injuries, they occasioned his death.

If they were for fighting, why not attack young persons like themselves. It is equally felony, to kill a drunk man, as to kill a sober man. If age may be killed by small violence, lawfully, so may infancy. Both ought to be peculiarly protected.

PRESIDENT went over the testimony and stated the substance of the case.

The first question for you to determine is whether any act of the prisoners, or any of them, to which the rest standing by gave their countenance and assistance, caused the death of *John Weston*. If it did not, there is an end to any further question; there is no homicide; and the defendants must be acquitted. If there be a reasonable ground of doubt, you will also acquit them.

The evidence was then applied to each of the prisoners.

Weight is due to the declarations of a dying person, after the mortal blow has been given. Relative to this,

1796.
*Woodcock's
 case, Leach
 440.*

there is a fine representation by lord chief baron *Eyre*; "Now the general principle, on which this species of evidence is admitted, is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced; and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law, as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

But if it appear to you, that any act of violence, committed by the prisoners, caused the death of *Weston*, it will remain for you to consider, with our assistance in points of law, what name the law gives to this act or acts of violence causing the death.

The same consideration will remain, from whomsoever of the prisoners this act of violence came: for they appear all to have been of one party in this outrage; all present and either acting or aiding and abetting, therefore, all guilty as principals in the crime.

It makes no difference, though the violence was small, such as would not have killed a strong or healthy man. If it shorten life a day, it is the same as if it shortened it ninety years. It would be the same thing, if the person killed had had a mortal disease on him. All must die some time: and shortening life is taking it away. Weakness and old age ought to be particularly guarded from injury, and treated with tendernefs.

By the law of *England*, all unlawful killing is presumed murder, until some extenuating circumstances are shewn by the prisoner, lessening the degree of the offence to something lower than murder. Malice is presumed, till want of malice is shewn. For the law holds the person of a man sacred.

Malice is express or implied.

Malice is implied from the outrageous circumstances of the act shewing a cruelty of disposition, a heart regardless of social duty, and fatally bent on mischief.—
Refer 255. Malice is a technical expression, and means the absence of any excuse of homicide.

But I apprehend, by our act of assembly, an unlawful killing, though it may be presumed murder, will not be

Refer 256-7.
4 Comment.
199.—2 Roll.
461.—2 L.
Ray 1487.

presumed murder *in the first degree*. It appears to have been the intention of the legislature to distinguish between malice express and implied; and to leave the punishment of death to the cases of express malice there mentioned; and, for that killing, which involves only implied malice, generally, the act provides the punishment of imprisonment and labour.

1796.

It is not necessary, in order to imply malice, that there should be an intention of killing. If the act of killing be unlawful, with the intention of hurting the deceased or any other person; if it have a natural tendency to bloodshed, or if killing be the probable or apparent consequence; malice is implied. If a man do an act which apparently must do harm, with an intent to do harm, and death ensues, it will be murder.

1 *Havk.* 127-
8.—*Foster*
258.—4 *Com.*
192-3.—2 *L.*
Ray 1488.

According to the law cited by the counsel for the prisoners, it might have been but manslaughter, if they had killed one of themselves *sham-fighting* by consent. But the violence to the old man was without his consent, and contrary to his remonstrance.

1 *Hale* 472-3.

If appearance of sport will exclude the presumption of malice, sport will always be affected, to cover a crime.

If the death was occasioned by the violent acts of the prisoners, and if those acts were done, with a design to kill, it is murder in the first degree; and if done without a design to kill, if with a design to hurt, and tending to bloodshed or death; it is murder in the second degree; if without such intention, it is manslaughter.

The jury returned with a verdict finding them guilty of murder in the *lowest* degree; and being informed, that unless they meant manslaughter, this was a conviction of murder in the second degree. They said they had considered the distinction between murder and manslaughter, and thought this was murder: and if there was no degree lower than the second, they found them guilty of murder in the second degree.

They were sentenced to an imprisonment of five years.

PENNSYLVANIA v. ABERILLA BLACKMORE.

1796.  ON application to me, a writ of *habeas corpus* was directed to *Aberilla Blackmore*, returnable before me, for *Cassandra* and *Lydia*, two *Negro* women, whom she held as slaves. At the return of the writ, the claim appeared to turn on this question, whether *Samuel Blackmore*, late husband of *Aberilla*, was an inhabitant of the county of *Westmoreland*, on 23d September, 1780. This being a question involving facts asserted and denied, it was agreed, that this should be put in the form of an issue, and be tried in the court of Common Pleas. It was accordingly tried this term; and it was agreed, that the jury should return a special verdict, to be drawn up by me. The object of the counsel for *Aberilla Blackmore* was, to have the proceedings removed into the Supreme court, for the opinion of that court on the facts found. Afterwards I proposed, and it was agreed, that, instead of a special verdict, there should be a special return to the *habeas corpus*, stating all the facts found by the verdict; and that the cause should go up to the Supreme court, on a *certiorari* directed to me, in this shape, of the writ and return only.

See act of As-
sembly, 13th
April, 1782.

The return was as follows:

"In obedience to the within writ, I have here *Cassandra* and *Lydia*, as within required; and as the cause of their being taken and detained, I certify and return;— That the said *Cassandra* and *Lydia*, *Negro* women, were slaves to my deceased husband, *Samuel Blackmore*, in the state of *Maryland*, where he lived, and they with him, as part of his family, before and in the month of *March*, in the year of our Lord one thousand seven hundred and eighty. That in *March*, 1780, he came into the then county of *Westmoreland*, in the state of *Pennsylvania*, to purchase land; and on the 24th day of that month, purchased a tract of land, then in the county of *Westmoreland*, but now in the county of *Washington**, and state of *Pennsylvania*, for 22,000*l.* continental money; and gave his bond for this money, which he afterwards paid. That returning to *Maryland*, where his

* *Washington* county was erected 28th *March*, 1781.

family still remained, he told one of his neighbours, who was then about to remove, and, in *April*, 1780, did remove thence into the county of *Westmoreland* aforesaid, that he should have a certain part of this land; bade him put a fall crop in, if he did not get there in time himself; gave him apple-trees to plant; and said he would be out there himself in *September*. That having sold his land in *Maryland*, he, about the middle of *December*, and not before, arrived with his family, at the land which he had bought, then in *Westmoreland*, now in *Washington* county, in *Pennsylvania*. *Lydia* was then with him, and *Cassandra* had been sent up about two weeks before, with two of his sons. That from that time, till his death, he continued to reside on this land, with his family, keeping *Lydia* and *Cassandra* part of it as slaves. That 'an act to redress certain grievances within the counties of *Westmoreland* and *Washington*,'* passed 13th *April*, 1782, enabling certain inhabitants of those counties to register their slaves, he registered *Cassandra* and *Lydia*, with the clerk of the peace of *Washington*, on the 19th day of *December*, in the year of our Lord, one thousand seven hundred and eighty-two, as follows: (to wit)† 'Samuel Blackmore, of township. *Cass.* a *Negro* slave, twenty-two years. *Lyddy*, a *Negro* slave, twenty years.' By virtue of which they are and were claimed and held as slaves, in the state of *Pennsylvania*. And this is the cause of their being so kept and detained.

ABERILLA BLACKMORE."

The proceedings having been removed into the Supreme court, it was agreed, by the counsel on both sides, that the validity of the return should be argued at the next court of *Nisi prius*, in *Washington*, and the determination of the claim be made, by the judges then attending.

Accordingly, it was argued before *Yeates* and *Smith*, judges of the Supreme court, on 18th *May*, 1797, at a court of *Nisi prius*, at *Washington*.

* This law is not published in *Dallas's* edition of the state laws.

† The form of the registration was made part of the return, on the application of Mr. *Ross* at the argument.

1796. *Brackenridge*, for the sufficiency of the return, read the act for the gradual abolition of slavery; and the act, of 13th April, 1782, to redress certain grievances within the counties of *Westmoreland* and *Washington*; and the act confirming an agreement entered into between this state and the state of *Virginia*; and made two questions.

1 *St. L.* 838.

2 *St. L.* 55.

3 *St. L.* 207.

1. Whether the act of 13th April, 1782, relates to inhabitants within the counties of *Westmoreland* and *Washington*, at the date of the act, or on the 23d September, 1780, when the agreement between the two states was closed.

2. Whether *Blackmore* was an inhabitant of *Westmoreland* county, on 23d September, 1780.

He contended that, by the purchase of a tract of land, sending up apple-trees, &c. he became an inhabitant.

As to registration, the abolition act is directory only: provided the truth be, that the persons are registered, mere formalities are not regarded. It is a law taking away property, and will be construed liberally in favour of the owner not of the slave. In 1780, this country was considered as *Virginia*, and its inhabitants as not bound by laws of *Pennsylvania*.

Ross, against the return. The abolition act provided against any introduction of slaves after the date of the act. All brought in after the act, instantly became free; all born after the act, are declared free at the age of twenty-eight; and the registration of slaves then within the state is secured by the penalty on the owner, of loss of property in any not registered according to the directions of the act.

1 *St. L.* 833,

840, 841.

The two *Negroes* in question, having been brought into this state after the 1st of March, 1780, are free, because not within the state on 1st March, 1780, nor, if within it, recorded before 1st November, 1780. The act of 13th April, 1782, reciting that "many of the inhabitants of *Westmoreland* and *Washington* counties, conceiving themselves under the jurisdiction of *Virginia*, had no opportunity of entering or registering their slaves, agreeably to the act for the gradual abolition of slavery," enacts, "that it be lawful for all such inhabitants of the said counties, who were, on the 23d of September, 1780, possessed of *Negro* or *Mulatto* slaves, or servants until the age of thirty-one years, to register such slaves or

servants, agreeably to the directions of the act aforesaid, for the gradual abolition of slavery, on or before the 1st day of *January* next; and that the master or masters, owner or owners, of such slaves or servants, shall be entitled to his, her, or their service, as by the said act is directed; and the said slaves or servants shall be entitled to all the benefits and immunities in the said act contained and expressed."

1796.

But this act cannot make those *slaves*, who were free under the act of *March*, 1780. And these women, having been brought in, after the 1st *March*, 1780, were free instantly after their being brought in. If they became free instantly after they were brought in, they remain free; for it is not in the power of any law, to make a free man a slave.

The object of the 5th section of the abolition law was to describe the sex and age of the slave, and the trade and residence of the master, so particularly, that slaves might, at any time, be certainly traced back. For this purpose, the directions of the act must be strictly complied with. But in the registry under which this claim to slavery is supported, there is no township, district, or profession of the master, nor sex of the slave. One of these *Negroes* is named *Cass*: This leaves it uncertain whether the person be man or woman, or the name *Cassius* or *Cassandra*. Strong indeed must be the leaning against liberty, if without any thing on the record to determine, this court shall say, that it was this woman *Cassandra*, who was then registered. *Liddy* is somewhat different. It is not so doubtful of what sex this slave was. But this less degree of doubt arises not, as it ought to do, from the record, but from our knowledge, that there is no name so like *Liddy*, as *Lydia*, which is a woman's name.

As to the law of 1782, it is certain, that the legislature is not more the sovereign than the executive is.—The legislature is the people acting under a limitation, and can enact no law contrary to the constitution. The courts will be vigilant over the laws; for on the pure administration of justice, according to the spirit of the constitution, our liberty and safety depend.

Can the legislature, by a law, declare a free person to be a slave, when the constitution, under whose authority

1796. they act, declares all men free, and freedom to be an unalienable right? If they can make one free-man a slave, why not a whole county? It is no answer to this that he was a slave, and, by an omission, became free; nor that he is black. All are alike in the sight of God. If he has reason, he is answerable for his conduct. No legislature has such a power over whitemen; and none, therefore has such power over black.

But it is objected, that it is doubtful, whether these counties were under the jurisdiction of *Pennsylvania*.—It turned out that they were. This was ascertained before *November, 1780*. This was one of the grievances to be remedied. But there was no power in the legislature, to give the remedy attempted. As well might they have made a law to introduce, as slaves, after the peace, slaves of *Pennsylvanians*, absent with their masters in the army. *Samuel Blackmore* could have been in no uncertainty. He was not here. He was in *Maryland*, and had no slaves here to register on the 23d *September, 1780*, or the 1st *November, 1780*. It was not on such, that the law of 1782 was to operate; but on such as, on the 23d *September, 1780*, were inhabitants of the disputed territory. On the 23d *September, 1780*, the dispute ceased, and it was no longer doubtful, whether *Pennsylvania* or *Virginia* had jurisdiction; but certain, that the laws of *Pennsylvania* were to govern every man here. The law of 1782 was not then made; *Samuel Blackmore* was not then here; and, coming in afterwards, he brought in his *Negroes* under the operation of the law of 1780; by that law, they became free immediately after their arrival here; and being once free, they must so remain.

Having land here does not make an inhabitant. Inhabitants of *Europe* have land here. Intention does not make fact. Intending to be a resident is not being a resident.

I hope the court will construe these acts liberally in favour of liberty, and strictly against the owner, who does not pursue the injunctions of the law. As the claim of slavery is so contradictory to the principles of reason and nature, I hope the court will go as far as possible, to reconcile them, and say, there shall be no slavery, but where every particular of the law is complied with.

1796.

If this were the case of white women, the construction would be liberal. It must be so, in the case of black women. Their case is worse than that of criminals.— They, confined for a few years, have the prospect of liberty at last. These never. Were an *American* prisoner in *Algiers*, claiming the benefit of a law there, which declared free all slaves not specially registered, to be told, that such law was a mere formality, what should we think of that country? Should it be told in *Algiers*, that we have a constitution, which declares all men free, and a law to register the name and sex of every slave; they would ask, “Why complain of us? If by that law, free men are declared slaves, why do you boast of a constitution?”

I argue this case without any recompence, but that which every man finds, in the satisfaction of doing a good action. And I am confident, that this court will take hold of the least flaw, to restore these women to the unalienable rights of nature.

Brackenridge, in reply. On principles of nature, there can be no slavery. But we live under an express constitution; and on constitutional principles, there can be no slave, for the constitution declares all men born free; and the question is, Are these of the human species?— Another section protects property: this was a species of property; and the protection of the constitution is claimed for it.

Such construction will be given, as to render the whole consistent; and the construction will be *secundum subjectam materiam*. These sections relate only to the parties to the contract. These *Negroes* were not parties to it; they were none of the people. If it apply to all men, and a *Negro* be a man, there is an end of the question. If *Negroes* be property, this can only be taken away by consent of the owner.

The compact between the states of *Pennsylvania* and *Virginia* was *in fieri*, till 1784; and the act of 1782 was 2 *S. L.* 207, made, not to correct, but to prevent, a grievance. The resolution for accepting the cession was not a law; for the stile of laws is, Be it enacted, &c.

To give perfect relief, the act of 1782 ought to be construed as applying to the inhabitants at the date of the act; because the boundary was not then run, nor the cession complete.

U

1796.

As to residence, he had bought land, with intention to remove, and reside on it ; he had sent out an agent, apple-trees, &c. He was no longer an inhabitant of *Maryland*.

Next day, the judges delivered their opinion, that the *Negroes* were free.

SOMERSET COUNTY.

December Term, 1795.

PENNSYLVANIA v. ADAM KEFFER.

1795.

THIS was an indictment against one of the grand jurors (on the presentment of the rest) for that he, being sworn, &c. "not regarding his oath, nor the good of the county, and the office of a juror, but holding the same in contempt, on 22d *December*, 1795, during the sitting of the grand-jury, on business given them in charge, did misbehave himself in the office of a juror, and abuse the trust put in him, by intoxicating himself with strong liquor, and disqualifying himself for the discharge of the office of a juror."

The foreman and others of the grand-jury proved the intoxication in a very high degree, during the sitting of the grand-jury. He slept by the fire, and could not be roused to do his duty, or answer questions.

PRESIDENT. If the incapacity arose from natural infirmity, or unavoidable accident, you ought to acquit. But, if it was voluntary, you ought to convict. The intention with which the intoxication was produced, whether with a direct view to disqualify, or not, is not essential to the conviction. For it was his duty, not only not to disqualify himself, but to take reasonable care to preserve himself in a state fit for doing his duty.

WASHINGTON COUNTY,

April Term, 1796.

THOMAS SMITH v. WILLIAM FREEL.

ON an appeal from the judgment of a justice of the peace, the plaintiff declared in *assumpsit*, on a promissory note, dated 16th April, 1782, for the payment of 2l. 19s. 6d. The defendant pleaded the statute of limitations. 1796.

The subscribing witness was not to be found; and proof was made, that *Freel*, since the suit was brought, had admitted, that he had given such a note, but said he had paid it.

PRESIDENT. This is not such a promise of a subsisting debt, as will answer the plea of the statute of limitations.

The plaintiff suffered a nonsuit.

ALLEGHENY COUNTY,

September Term, 1796.

SAMUEL PURVIANCE v. WILLIAM SUTHERLAND.

INDEBITATUS *assumpsit* for goods, wares, and merchandizes, delivered to *William Sutherland* and *William M'Donald*, on a promise by both, and by each, with an averment, that neither had paid.

Proof was made of the book-entries, and of declarations by *Sutherland* of a partnership between him and *M'Donald*, and that it has been, and is, usual with traders, to have and give interest on book-accounts, after six months.

1796.

Woods, for the defendant, produced a receipt, dated at *Chambersburgh*, from *Purviance* to *Sutherland*, for ginseng, at a certain price, or at the *Philadelphia* price, if it was higher. Hence Mr. *Woods* inferred, that there was then no partnership. He produced also another receipt to *William Sutherland* and *William McDonald*, for otter skins and cash.

Ross, for the plaintiff. We have no notice of the defalcation. The receipt is a private transaction. This suit is brought on a partnership account.

Rule 21.

PRESIDENT. Under our rules of practice, it is the plaintiff's fault if he have not notice of the particular payment or defalcation. If he wanted it, he ought to have demanded a specification. The receipt to *Sutherland alone*, seems not sufficient to contradict the evidence of partnership. But *Sutherland* ought to have credit for it in this case; as the suit is against himself, on a promise made by himself.

If, from the evidence of general custom of trade, you can infer, that, in this case, it was the agreement of the parties, that interest should be payable, after six months; you may find interest after that time.

The jury found for the plaintiff with interest after six months.

Lessee of STEPHEN BAYARD v. CHARLES M'INNES.

EJECTMENT for $209\frac{1}{4}$ acres of land, on a lease dated 2d *January*, 1785.

The plaintiff shewed a location No. 1293, dated 3d *April*, 1769, in the name of *Samuel Thomson*, for 300 acres, in *Turtle creek* bottom, adjoining a claim and improvement of *Eneas M'Kay*, and including his own improvement; a survey of $209\frac{1}{4}$ acres, made by *William Thomson*, the deputy surveyor, 30th *June*, 1769; and a patent to *Samuel Bayard* and *Elizabeth* his wife, and *Samuel M'Kay*, reciting the location and survey, and a deed from *Samuel Thomson* to *Eneas M'Kay*, dated 21st *May*, 1769.

The defendant produced a location, No. 3400, dated 1796. 13th June, 1769, in his own name, for 100 acres on Turtle creek, between the two crossings, joining *Angus McKay* on the east, including his improvement; a survey of 116 acres, and 90 perches, made by *John Henderson*, then deputy surveyor, 10th December, 1784; and a patent, dated 19th April, 1786.

Brackenridge, for the defendant, then read a written copy of an act of assembly passed 3d February, 1768, and of a proclamation by the governor, dated 24th February, 1768, reciting this act of assembly; both directing the removal of persons settled on lands not purchased from the *Indians*, but providing that this should not extend to settlers under the approbation or permission of the commanding officers to the westward.

He then proposed to produce a witness to prove that *Charles McInnes* had the approbation and permission of the officer commanding at *Fort-Pitt*, to settle on the main roads or communications leading through this province to *Fort-Pitt*; and that, in consequence of this approbation and permission, *Charles McInnes* settled on the land in question, which was on a main road and communication.

Ross, for the plaintiff, objected to any parole testimony; 1. Because such permissions must have been given in writing; 2. Because *Charles McInnes's* application does not recite it; and 3. Because, where there was no written permission, the commissioners of property could not take notice of it.

Brackenridge. It is not required, either by the law or the proclamation, that the permission or approbation should be written. 2. It is not necessary, that a settler with permission should recite his permission in his location. The adverse applicant ought to have known, whether or not there was a settler with permission on the ground for which he applied. It was not to be supposed, that the applicant was to make his application or location at random, or on a map; but to take care that his application was for ground unclaimed under any authority.

Woods, for the plaintiff. The preamble to the opening of the Land-Office, 3d April, 1769, gives a preference

1796.

* See Appen.
dix.

to those who had settled plantations, especially those who had settled by permission of the commanding officers to the westward.* But, notwithstanding the permission, if an improvement was not made till after the purchase from the *Indians* at *Fort-Stanwix*, no preference was to be given. But the preference was given only to those who applied on 3d *April*, 1769. For, if the person permitted, and to be preferred, did not apply on that day, he lost his preference. It was presumed, that, unless he applied then, he waved his preference. The proprietaries were then at liberty to grant the land to any other, and were not to keep up a preference to the settler any longer: for if they must keep it up for a day, they might be obliged to keep it up thirty years.

Brackenridge. The word *approbation* implies, that there was no necessity for a written permission. Settlement with the knowledge is evidence of the *approbation*, of the commanding officer; and not being turned off, is permission. It behoved the applicant to apply only for land to which none other had a better claim. All applicants were supposed to know the ground, and they deceived the proprietor, if they made not a just representation.

The objection of the loss of preference, unless application was made on 3d *April*, 1769, is the only formidable objection. From 1736, in consequence of the minority of the proprietors, legal titles could not be granted; and, on application to Mr. *Logan*, the agent, he permitted settlements, and gave a promise of titles, when the proprietors should be of age. After the proprietors were of age, in consequence of lord *Baltimore's* claim to the southern border of *Pennsylvania*, permits were given to settle, and support the jurisdiction. This was an origin of a custom, that settlers had an equitable right, and the proprietors were bound to give them a title; and courts of justice invariably determined so, and directed in favour of improvers. Under this idea, people came over the mountains. The act of assembly, which I have read, sanctioned this before the purchase only if it was by permission. The proclamation of the governor, also a proprietor, is to the same effect. The preamble to the opening of the Land-Office respected only the locations put into the box or trunk; and took

not away any right vested in those who had settled by permission. The preamble regulated only the preference between locations then put in, and took not away the right under the usage of *Pennsylvania*. It could not have been its intention to take away this right. The people of this country had no notice. There was but one gazette in *Philadelphia*. There was no post, nor advertisement. The settler depended not on the acts of the government, but on the strokes of his axe on the ground; and thought the man must be a robber, who would take away his land, from which all, but he who had *permission*, were banished by a law and a proclamation.

1796.

PRESIDENT. It may, on the whole be best, to receive the testimony: but we will reserve the point; that, if there should be a verdict for the defendant, there may be a motion for a new trial.

Evidence was then given, that *M^cInnes*, in 1768, asked captain *Edmonstone*, the commanding officer at *Fort-Pitt*, for a permission for a piece of land. *Edmonstone* said he could give no permission to settle but on the road, and desired him to go and find a piece of land on the road, and come to him, and he would give him a permission. Immediately after this, *M^cInnes* sent a man to this place, who grubbed, a week, and made four or five hundred rails, in the bottom between the two fordings of the creek, where he has his house and clearing now. And in *March*, 1769, he built a cabbin there, twenty-five feet square, and covered it. *M^cKay* knew of *M^cInnes* working there, and gave directions, that he should not be permitted to clear over his marked line, which he pointed out. *M^cInnes* then lived at some distance, and settled another plantation, which he afterwards sold. In 1770, or 1771, there was corn raised at *M^cInnes*'s improvement on *Turtle creek*; but he did not live there till 1782, or 1783.

The plaintiff then produced evidence, that the present deputy surveyor had traced the lines of the patent, and found corresponding line and corner marks on the trees; and that the survey of *M^cInnes* interfered with those lines. Evidence was then given, that *M^cKay* had taken out the location in the name of *Samuel Thomson*, and had paid

1796.

for the survey; that the conveyance from *Thomson* was not to be found; that *M^cKay* had forbidden *M^cInnes* to work on this land; that *M^cInnes* had agreed to forbear, if *M^cKay* would give him 4*l.* to pay for the surveying of another tract; that *M^cKay* and *M^cInnes* agreed to submit it to three men to value *M^cInnes*'s improvement; and that they valued it, (being, as appeared from a writing produced by the plaintiff, dated 15 *November*, 1770, signed by them, a cabin, without roof or door, with a few rails deadened) at 45*s.*

PRESIDENT. The title is clearly in the plaintiff; unless it has been divested by some act of *M^cKay*'s.— You will enquire, 1. Whether there was any agreed line; and 2. Whether, if there was, *M^cInnes* has relinquished his claim under it, by a subsequent transaction.

Verdict for the plaintiff.

2 *Str.* 1080. NOTE. In this case, a special jury had been ordered;
3 *Bla. Comm.* (at a term in which the cause was not tried) and Mr.
358, 397. *Brackenridge* moved that the costs be paid by the plaintiff,
2 *St. L.* 268. on whose motion it was ordered.

3 *St. L.* 732. PRESIDENT. The costs ought to be paid by the party putting off, or losing the cause. The bill of fees directs this.

Lessee of the Executors of WILLIAM THOMSON v.
DAVID GILLILAND.

IN ejectment for land in *Pitt* township, the plaintiff produced a location, No. 3201, dated 9th *May*, 1769, in name of *Robert Mitchel*, for three hundred acres, adjoining *John Donne*, on the road from the *Bullock-Pens*, to *Braddock's-Fields*; and showed also the location in the name of *John Dunn*, No. 3115, dated 20th *April*, 1769, for three hundred acres, at a place commonly called the *Bullock-pens*, at the *Nine-mile* run, on general *Braddock's* road, adjoining lands claimed by *John Frazer*, *Peter Rolleter*, *Conrod Winemiller*, and *William Elliot*.

He then proposed to give in evidence a draught of a survey, without specification of date or quantity, but stating the out lines, courses and distances, corner trees,

and adjoining claimants, with the following writing on the face of it: "*Robert Mitchel*, now *William Thomson*," and underneath, "Good land, bought of Mr. *Joe Spear*, at 300l." and, together with this, the copy of the location, put into the hands of *William Thomson*, (the deputy surveyor) for surveying, indorsed in *Thomson's* hand writing, "*Robert Mitchel*, No. 3201, executed."

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Brackenridge, for the defendant, objected to this evidence. 1. Because this draught is in the hand writing of the testator of the plaintiff, made by the person interested, whose act, in his own behalf, has no validity, until recognised by the surveyor general.

2. Because this paper is not certified to have been a survey made by *William Thomson*, the deputy surveyor, nor by any one for him, or under his authority or direction; nor indeed ever made. It appears only a diagram.

Woods and Young, for the plaintiff. 1. None but *William Thomson* could have made the survey. We will prove when it was made; and that it was before *William Thomson* was interested. Surveyors have always executed surveys of their own land.

2. It was determined at *Nisi prius* in *Huntington* county, that a diagram, made by the surveyor, the field notes of the surveyor, and the tracing of the lines on the ground, and finding them to correspond with those described on the draught, was sufficient evidence of the survey. We will prove, that these lines have been traced on the ground, and correspond. It is immaterial whether the survey was returned or not: It is enough, if we prove, that it was made.

Lessee of Johnson v. Cor. Shippen and Teates J.

PRESIDENT. The testimony is admissible, as part evidence of a survey.

Evidence was then given, that in 1769, the witness had a survey to make adjoining this, was told by *William Thomson*, that he had made this survey for *Robert Mitchel*, and saw the fresh marks of the line of this survey next his land, and they corresponded with the line on the draught shewn; that the lines round *Mitchel's* survey had been lately retraced, that the marks appeared old, and all made at one time, and the lines exactly corresponding with those on the draught shewn; and that they comprehended the greater part of a field of *Gilliland's*.

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The plaintiff then produced a conveyance, dated 4th April, 1770, from *Robert Mitchel* of Cumberland county, to *William Thomson* and *Alexander Ross*, of the land claimed under the location, acknowledged 6th August, 1770, and recorded 1st September, 1794.

Evidence was then given, that one *Winemiller* lived on this land, declaring, that he had purchased it from *Ross* and *Thomson*, before the war with Britain.

A conveyance, dated 6 October, 1793, from *Winemiller* to *Joseph Spear*, for this land, was then produced; and also a conveyance from *Spear* to *William Thomson*, dated 1st June, 1781.

The defendant then produced a copy of the same location to *Robert Mitchel*; a conveyance, dated 9th September, 1772, from *Robert Mitchel*, corporal in the 18th regiment, to *Jacob Boufman*, of three hundred acres of land, adjoining a tract of land belonging to

, on the road from *Bullock-pens* to *Braddock's-field*; an assignment, dated 9th October, 1772, by *Jacob Boufman* to *Jacob Miller*; and a conveyance, dated 23d February, 1792, from *Jacob Miller* to *David Gilliland*. Proof was made of the hand writing of *Robert Mitchel*, corporal in the 18th regiment, to the conveyance to *Boufman*; and it was also proved, that the name, *Robert Mitchel*, signed to the conveyance to *Thomson* and *Ross*, was not in the hand writing of *Robert Mitchel*, corporal in the 18th regiment.

Brackenridge then brought forward a witness, to prove that *Robert Mitchel*, corporal in the 18th regiment, had declared, that he had taken out the location.

Woods objected, that this would be admitting a man to make a title by his own declaration. If *Robert Mitchel* were present now, he could not be admitted as a witness; shall then his declarations be admitted?

Brackenridge. Though *Mitchel* could not now be admitted to prove, that he had then taken out the location, it may now be proved, that he then declared, that he had taken out the location.

PRESIDENT. Surely no man can be admitted to establish a title by his own declarations. But declarations of interest at the time may perhaps be admissible, to shew that this person was the person named in the location. We will admit the testimony; but reserve the

point, as such evidence, if proper, is precarious, and not strongly to be relied on.

A bill of exceptions was proposed; and it was agreed, that it might be drawn up afterwards.

The witness then proved, that after *William Thomson* brought up the locations, *Robert Mitchel*, corporal in the 18th regiment, two serjeants, and *John Dunn*, a clerk to *Alexander Ross*, all then in the garrison, told him, they had each of them got a location for land in this country, and were going out to have it surveyed. *Robert Mitchel* said, his location was either for or near the *French Bullock-pens*, near to *William Elliot's*. When *Mitchel* was going to leave the garrison, there were hot words between him and *Ross*; and *Mitchel* told the witness, that *Ross* wanted to have the location from him, but *he damned himself, if he should have it*, and said he would convey it to another. *Ross* had made use of the names of several soldiers, in taking out locations.

The defendant then produced testimony, that, about the year 1772, *Jacob Miller* came into this country, and bought a tract of land from *Jacob Boufman*; and some months afterwards, sent out one *Bougher* to improve on it. *Bougher* lived on it with his family.— There was also proof, that, when *Thomson* surveyed the land, there was a cabbin on it raised to the joists; and proof, that *Bougher* settled within what is now the claim of *Gilliland*.

A survey, made 22d *August*, 1790, by the surveyor of the district, on *Mitchel's* location, was shewn, containing two hundred and sixty-two 1-quarter acres.

Young Mitchel was but a trustee, and had but the 3 *Att. 96.* mere legal or nominal right.

Brackenridge. The presumption is, that *Robert Mitchel* took out the location, and had the interest in it.— The contrary must be proved. *Thomson* abandoned his survey, never returned it. The law has guarded against secret conveyances? Why not against secret surveys? No use was ever meant to be made of this survey. Shall we bring forward notes found in a desk? Finding no return of a survey, the improver had reason to presume, that the location (which cost but a dollar) with the survey on it, was abandoned; and had good heart to go on, and make further improvements.

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Woods. There was no improvement, at the time of the survey, to defeat the legal title. *Mitchel's* declaration is no evidence, that the location was his. It only proves, that, when he heard, there was a location in his name, he was determined to claim the land.

PRESIDENT. If the survey was compleatly made in 1769, as it appears to have been, there was then no improvement or settlement, that ought to have been regarded, and the title is in the person who has the interest in the location.

The interest was in the person who procured, and paid for the location.

If *Robert Mitchel*, corporal in the 18th regiment, was the person who procured the location, and paid for it, the interest was in him. If the location was taken out by another, in the name of *Robert Mitchel*; *Mitchel* was but a trustee, without interest.

You will therefore enquire, 1. Whether *Robert Mitchel*, named in the location, had an interest, or only a bare trust. 2. Whether *Robert Mitchel* named in the location, was *Robert Mitchel*, corporal in the 18th regiment. 3. If he was, and was but a trustee, whether his title has come into the hands of *Gilliland*, *bona fide*, without notice of the trust, and for an adequate consideration: for if so, *Gilliland* has the estate clear of the trust. For I cannot see any good reason for distinguishing this from the ordinary case of a trust, or for permitting owners of locations to run no risk, while in using the names of others, they give them an opportunity of imposing on innocent purchasers.

The jury came to the bar, ready to give a verdict; and the plaintiffs suffered a nonsuit.

NOTE.—See the case of a bill of exchange payable to a *fictionis* payee, a person not in existence, &c. 3 *T. Rep.* 174, 182, 481.—1 *H. Bla.* 313, 569.

HUGH MULHOLM v. JOHN CHENEY.

1796.

IN *September*, 1793, on a warrant from a justice of the peace, on a judgment against one *Wright*, the constable had a horse delivered to him in execution by *Wright*. *Cheney* becoming security for the safe keeping and delivery of the horse, the constable left him in possession of *Wright*, till he should be demanded for sale, which, it was expected would be in about three weeks. In the mean time, *Wright* paying part of the debt, the plaintiff stayed the sale; and *Wright*, in the presence of *Cheney*, who made no objection, delivered the same horse, then in the inclosure of *Cheney*, who lived on *Wright's* plantation, to *Mulholm*, to indemnify him against a debt for which he was security for *Wright*. In the end of *February*, 1794, the constable, being directed by the justice to make sale, called on *Wright* for the horse, who did not deliver him, but pretended he had paid the debt. At the *March* court in *Pittsburgh*, the constable called on *Cheney* for the horse. *Cheney* pointed out the horse as a boy was leading him to water; and took him by the halter, and delivered him to the constable.

Mulholm brought replevin for the horse. And now a motion was made to quash this replevin, on the ground, that it was brought for property taken in execution.

Brackenridge, for the motion. Replevin, at common law, lay only for goods taken by way of distress for rent. It certainly lies not for goods taken in execution; for that would render the process of law void; and there would be, in the language of *Hudibras*, "No end to th' everlasting suit." Even in the case of a third person's goods, taken in execution, in order to prevent collusion to defeat executions, trespass, and not replevin, must be brought.

Our proceedings in replevin, are founded on our act of assembly. 1 St. E. 59.
Dall. 156.

An act of assembly has declared all writs of replevin issued for any owner of goods taken in execution, or by distress, by any sheriff, county lieutenant, constable, or collector of public taxes, to be irregular, erroneous, and void; and has directed that it shall be quashed; and that the court shall award treble costs to the defendant, and may 1 St. L. 795.

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Journ. 27th
March, 1779.

order an attachment against the clerk who knowingly made out the writ. This must extend to third persons; for, as to parties to the execution, the law was unnecessary, for the common law made such replevin irregular. This act must mean something more. It appears from the journals of the assembly, that it was the intention of the legislature to prevent replevins by third persons, for goods taken in execution. For, when the first section was under consideration; a motion was made to restrain the prohibition to parties to the execution, by adding, after the words "owner of goods taken in execution or by distress," the following words, "*being the defendant in the action, or person incurring the fine.*" This motion was negatived; and against this negative, there was a solemn protest, "that it left officers at full liberty, under the pretence of executing the laws, greatly to oppress the people; left their property very insecure; and was highly dangerous to their rights and liberties."

It is better, if property of a third person be found in the possession of the person against whom the execution is, that he who gave the trust suffer, than that, by collusion, the process of law be defeated.

Ross, for the plaintiff. I will not contend, that, if the property of a third person were taken in execution by a sheriff or constable, the owner could bring a replevin against the sheriff or constable, while the property was in the possession of the officer, but that he could against the vendee of the officer.

The affidavits shew, that this horse is not to be considered as a horse taken in execution; but as taken by a private individual, from a *bona fide* transferree and possessor. The execution was against *Wright*. The horse was left in the custody of *Wright*. *Cheney* was security to the constable, that *Wright* would deliver the horse to him. The lien of the execution on the horse was then dissolved; and the constable could look only to the security. The sale of the horse to *Mulholm*, by *Wright*, in the presence of *Cheney*, is to be considered as the sale of the constable; for it is the sale of his bailee. This is not a horse taken in execution; the lien was gone. It would be dishonest, to suffer an innocent purchaser to be defrauded. The return day of the execution was past. *Cheney* was no constable, and did not take the horse as

¹ *Wils. 44.*
² *T. Rep. 596.*

a constable. It is not against a constable that the suit is brought. This is a proceeding for a penalty of treble costs.

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The court took time to consider, and next term delivered their opinion.

PRESIDENT. Were the act, declaring replevins void, to be understood as restraining only third persons, whose goods were found in the possession of him against whom the execution was, it would be less exceptionable. But it is contended, that it extends to all owners: and this, surely may deprive an innocent owner of a specific, summary remedy, for a wanton act of oppression by an officer, the more odious, as it is under the colour of public authority; though he would have this remedy against any other but an officer.

It may, indeed, be said, that, in order to prevent collusion with debtors, by fraudulent transfers, there may be reasons of policy for refusing to extend to the case of goods taken into the custody of the law by execution, &c. a remedy, which seems originally to have been confined to the single case of distress for rent, and, confiding in the virtue of officers, rather than of individuals, for leaving any transgression to the ordinary remedy of an action of trespass. And, indeed, from the defendant in replevin's power, by setting up a claim of property, to retain the goods, an action of replevin may be a not more specific remedy, than an action of trespass.

But, notwithstanding, as no value may compensate the *pretium affectionis* of the thing taken; as a warrant to take the goods of *A.* will not justify taking the goods of *B.*; and an officer acting without authority is but an individual; as we ought not to suppose, that the legislature intended to countenance trespasses; and it is the duty of courts to extend remedies; I have a strong reluctance against adopting the construction contended for of this act, as a general prohibition, and I would not admit this construction, if I could exclude it.

The law of *England* states generally, that replevin does not lie for goods taken in execution; yet (except for a reason which is given for it, that goods are only repleviable, when taken by way of distress, and which does not apply here, where replevin lies for any claim of goods), I do not know, that this is not understood

2 Str. 1184.
5 Com. Dig.
436. Bul.
Ni. Pri. 53.
Dall. 157.

1796. only of a replevin brought by him against whom the execution is; for that is the case of the only replevin of this kind, that I have observed, where this can be ascertained.
 1 *Str.* 567.

If it be the meaning of the law of *England*, that replevin for goods taken in execution is only prohibited, when brought by him against whom the execution is, such may also be the meaning of the act of assembly.—Acts are sometimes made in affirmance of the common law.* And I am informed, that, at the passing of this act, there was occasion for such an explicit declaration, by act of assembly; for, at that time, many actions of replevin had been brought by persons, whose goods were taken for taxes and militia fines. This law was made on the spur of the occasion, and in the fervor of a revolution. The assembly might have been unwilling to admit any amendment, which might suggest an evasion of payment of a public tax; and may have determined, making the words as general as the expressions in the *English* books, to leave their construction, as in *England*, to the courts. A law so made, and restraining a remedy, will be narrowed as much as possible in the construction.

Journ. Assen.
 17th February
 1, 27, 31,
 March, 1779.

If the sheriff or officer be doubtful, as to the property; he may call on the plaintiff to shew him property, and indemnify him; or he may hold an inquest, to find whether it be the property of the defendant, or not.

But it is not necessary to give any opinion on this point: for we are of opinion, that this is not the case of goods taken in execution; and therefore, that the plaintiff take nothing by his motion. The horse was not taken out of the hands of the constable. The constable delivered him to the owner, and having thus enabled him to impose on others, he must look to him or his security.

* It has been said, that even an act of parliament to make a man judge in his own cause would be void. *Hob.* 87. There was therefore no occasion for an act of assembly forbidding any member of a court of justice to sit in judgment while his own cause is upon trial. Yet such an act there is,
 1 *Str. L.* 33.

WESTMORELAND COUNTY.

September Term, 1796.

Lessee of JOHN GALBRAITH v. JOHN M'GAW.

THIS was an ejectment for 300 acres of land, on 1796.
Campbell's run, Donegal township.

The plaintiff shewed a location No. 3048, dated 13th April, 1769, in the name of *Michael Coffman*, for three hundred acres on the south branch of the *Four Mile run*, bounded, on the south, by the claim of *Philemon Askins*; on the east, by the claim of *Thomas Pitton*; and, on the north, by the claim of *Thomas Campbell*.

He then shewed an order, by *John Boyd*, (a deputy surveyor under *William Thomson*, surveyor of the district) on *Michael Coffman*, for 3l. 5s. remainder of surveying fees.

Woods, for the plaintiff, then suggesting, that the first survey, made by *John Boyd*, had not been returned, shewed a draught and certificate of a survey of three hundred acres and the allowance, made 11th February, 1795, by *Benjamin Lodge*, then surveyor of the district, in pursuance of an application, No. 3048, dated 13th April, 1769, with a note annexed, that this survey is subject to a claim of *John M'Gaw*, on a late warrant, but the lines of it appear to have been run twenty odd years ago.

He then shewed a conveyance of this location and land from *Michael Coffman* to *William Campbell*, dated 11th June, 1790, reciting a previous conveyance, dated 8th April, 1775, and (because it did not recite the location) confirming that conveyance. He also shewed a conveyance by *James Guthrie*, sheriff of *Westmoreland* county, to *William Parks*, reciting a judgment against *Thomas Campbell* and *Michael Coffman*, of October term, 1773, a *fieri facias* tested of that term, a levy on a tract of land "on which defendant lives, with a small improvement subject to incumbrances;" and a judgment against *William Campbell*, 6th October, 1791, a *fieri facias*, 23d March, 1792, a levy of "three hundred acres

1796. of land, more or less, joining lands of *John M'Gaw*, *Nicholas Wilson*, and others; *venditioni exponas*, on both judgments, and sale, 14th *September*, 1792, of that tract of land of three hundred acres, more or less, joining *John M'Gaw*, *Nicholas Wilson*, and others, to *William Parks*, to whom the conveyance thereupon is. And he shewed a conveyance of the same land by *William Parks*, to *John Galbraith*, dated 18th *February*, 1794, and reciting the sheriff's deed.

The assistant who made the survey under *Benjamin Lodge*, on 11th *February*, 1795, proved, that he found old lines round this survey, except as to part, where he threw out land, as the old lines contained more than the lines of this survey; that he threw out part of that which *John M'Gaw* claims, and a greater part at the opposite end of the survey; and that *John M'Gaw* has land out of this survey, besides what he claims within it.

Brackenridge, for the defendant, produced a warrant to *John M'Gaw*, dated 29th *December*, 1785, for two hundred acres including an improvement, joining lands of *James Campbell* on the north east, *William Campbell*, and *Nicholas Wilson*, interest commencing from *March*, 1779; and a survey of two hundred and twenty-five acres and twenty-two perches, made on this warrant, 27th *June*, 1786.

Evidence, was then given, that, in 1769, there was a deadening on *Coffman's* land; that, in 1770, his house was raised; that, in the fall of 1769 or 1770, *John Boyd* made *Coffman's* survey, conducted by *Thomas Campbell*, who said he had taken in the cream of the land; that one of the lines made by *Boyd* is now *M'Gaw's* line, is near a spring, which it leaves out of *Coffman's* survey, and is near where *Coffman's* house was afterwards built, and goes through a field; and that *Coffman* shewed this as his line, in 1772, to one who proposed to buy from him, and gave as a reason why it went through the field, that he was absent, when the field was cleared, and the grubber went over the line; and said it was *Thomas Campbell's* doings to build the house so near the line.

Evidence was also given, that, in *February*, 1771, *John Overun* settled where *John M'Gaw* now lives, built a cabin, cleared two or three acres and put it in corn, and lived there till *April*, 1772. His brother-

in-law took possession of it under him, and lived there till *Overun* sold it, in 1773, to *John Livingston*, who, the same year, sold it to *Hugh Lorimer*, who, on 13th August, 1780, assigned his conveyance of it to *John McGaw*. There had been a conveyance from *Overun* to *Livingston*, and it was given to *McGaw*, but was since lost. The conveyance from *Livingston* to *Lorimer* was dated 9th November, 1773, and stated a purchase and bill of sale from *Overun* of 6th March, 1773. *Lorimer* settled on the land the spring of 1774, and lived there, except when driven off by the *Indians*. In 1786 or 1787, one *Rankin* an assistant surveyor came to make a survey for *Thomas Campbell*, on *Coffman's* location, began at *Boyd's* corner, and went round till he came to *McGaw's* line, but would not cross it; and *Campbell* directed him to enlarge the survey towards *Philemon Askin's* claim. Evidence was also given, that, in 1772, *Coffman* and *Overun* agreed, that the line between them should be two rods beyond the spring, so that *Coffman* should have it: another witness said, that *Coffman* was to have a way to the spring.

There was also shewn by the defendant, a written agreement, under seal, by *Michael Coffman* and *Thomas Campbell*, dated 8th April, 1775, to sell to *William Campbell*, a tract of land for which he was to take out a warrant. This, the defendant's counsel suggested was the deed referred to by the conveyance from *Coffman* to *Campbell*, dated 11th June, 1790. And one witness swore that *Coffman* said, his located lay over between the disputed land and the *Four-mile* run.

Michael Coffman was called, and swore, that, in 1768, he employed a man to make an improvement for him; that he cut a clapboard tree, raised two logs high of a cabin; that he went out next spring, hired two men, and worked on the land, settled there near the spring, applied for a location, claimed the land in dispute, cleared on it, and made no lines with *Overun*; that *Boyd* did run the line between his house and the spring, but told him he had not his compliment, and he would come back, and make other lines; that he never came back, but he understood one *Hamilton* came, after he had sold the land to *William Campbell*; that he intended to hold

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down to the branch of the run; and that *Thomas Campbell* never had any interest in the location.

Brackenridge, for the defendant, then produced a copy of a record of an ejectment to *April* term, 1774, for this land, by the lessee of *John Livingston* against *Thomas Campbell*; which stated that, at *January* term, 1775, this dispute was referred, by consent of the parties, to five arbitrators, who, 19th *February*, 1776, awarded that *Thomas Campbell* had no right to the land, and that he pay costs.

Woods, for the plaintiff, objected to this on two grounds. 1. Because no agreement of *Thomas Campbell* subsequent to 8th *April*, 1775, could be admitted; for if he ever had any right, he, together with *Michael Coffman*, had, by deed of that date, conveyed this land to *William Campbell*, and afterwards could not affect it by any act of his.—2. Because the judgment against *Thomas Campbell*, and the levy of this land on it was prior to the reference or the ejectment.

Brackenridge. No subsequent act of *Thomas Campbell* could deprive us of the benefit of any agreement made while he had an interest. He was tenant in possession; was bound to warrant; and therefore his act is the act of his assignee.

PRESIDENT. The act of *Thomas Campbell* cannot affect *Coffman*, nor *William Campbell*, after the sale to him. A submission is revocable before the award or hearing.

Brackenridge then offered a decision of the Board of Property on a *caveat* entered by *William Campbell* against *John McGaw*, dismissing the *caveat* because a record in ejectment had been produced.

Woods. The court having already rejected the ground of this decision, the decision itself cannot be received.

PRESIDENT. As a decision between the parties in this suit, on the subject now in dispute, it may be given in evidence. Its operation is another thing.

Brackenridge contended for the line run by *Boyd*, or, at any rate, the agreed line, as the boundary between the parties.

Woods argued, that the line run by *Boyd* was but a line of experiment and never intended to be final, and that the agreed line was incredible.

PRESIDENT. The arbitration or reference and award or report, with the judgment on it, must be laid out of the question, as not binding the present parties. If so, as the decision of the Board of Property states this as its foundation, it cannot, with propriety, be allowed to influence this question. 1796.

The location intituled *Coffman* to three hundred acres, but he might limit himself, if he pleased to one hundred. He did limit himself by *Boyd's* line, which, if acquiesced in, was decisive. He might indeed have called on the public authority to change it; and it would have been changed, if no intermediate legal or equitable claim were affected by the alteration. But, if an intermediate right interfered, the alteration could not affect it.

The only clear evidence of the interference of public authority, to alter the limitation of *Coffman's* claim, is the survey made by *Benjamin Lodge*, 11th February, 1795. That indeed refers to *old lines*. How, or when, or why, the old lines were made, it does not appear.

The questions then are, Were those old lines made by authority, were they such as would have been a limitation of *Coffman's* claim, or were they voluntary, and not binding him? If they were voluntary and not binding him, were they an alteration of *Boyd's* authoritative survey? If they were authoritative, did any intermediate legal or equitable right intervene?

Before 11th February, 1795, a legal right, *McGaw's* warrant and survey, intervened; and no act done by *Galbraith* then, could affect the title acquired by *McGaw* before.

The agreed line rests on the credibility of the witnesses; and the truth must be ascertained by you.

The jury found a verdict for the defendant.

FAYETTE COUNTY,

September Term, 1796.

CHARLES LARSH v. HANNA LARSH.

1796.

THE case on a writ of partition was thus.—*Paul Larsh* was seized in fee of an estate in *Fayette* county. By his first wife, he had issue *Charles*, the plaintiff. By his second and surviving wife, he had issue *Hanna*, the defendant. He made his will, on 17th *November*, 1792, devising one third of his land to his wife, during her widowhood; one third to his son *Charles*, in fee-simple; and one third to his daughter *Hannah*, in fee-simple; and his wife's third, after her death or marriage, to them also in fee-simple, to be equally divided between them: provided also, that, if he should have more children, they should be equal sharers, notwithstanding the former bequeathments. He died 11th *April*, 1793. In *August*, 1793, *John Larsh*, a posthumous son, was born, who died in *August*, 1794, during the widow-hood of his mother.

On this case, the following questions were submitted to the opinion of the president.

1. Whether the estate devised was in joint-tenancy, or in common?

2. If the former, will not the share of *John* be equally divided between *Charles* and *Hannah*, as survivors? If the latter, does not such share vest exclusively in *Hannah*?

2 P. Wms.
741.

Campbell, for the plaintiff. In a will, where the intention is plain, it will control the legal operation of the words.

Lessee of Ker-
lin v. Bull.
Dall. 175.
Anon. Dall.
20.

A devise of lands to a son, when he arrives at the age of twenty-one years, to hold to him, his heirs and assigns forever, is a vested devise; and if, after the death of his father, the son die under age, intestate, unmarried, and without issue, his mother surviving, the estate devised shall not go to his eldest brother, as heir at common law, but be equally distributed among his brothers and sisters.

The act of 23d *March*, 1764, directs, that the estate of children dying intestate, in their minority, unmarried and without issue, shall be equally divided among the surviving children. This obviates any objection, derived from *John* the deceased child's being born of a second wife; for it embraces all the surviving children, more especially, when the estate (as in the present case) is derived from one common ancestor.

1796.

Dall. St. L.
App. 47.

Young, for the defendant. The posthumous son of the testator in the case stated was particularly provided for in the will; and became entitled to one-third of the land by purchase as devisee. The act of assembly entitles a posthumous child, not provided for by will, to such part of the estate as if the father had died intestate.

Dall. St. L.
App. 48.

John Larsh became seized of an estate of inheritance in the land, subject to the common rules of descent.—*Charles* and *Hannah* are clearly several devisees, and not joint tenants; for no benefit of survivorship is mentioned, and the words "to be equally divided between them," imply a tenancy in common, and relate to the whole estate. Joint tenancy is not favoured in the law: The posthumous son was to take in the same manner; and whatever may be reasonable, or however the testator may have intended, his intention can be looked for only in the will. Any intention not found there cannot be presumed. If any such intention could be presumed, it would be in favour of the youngest and most helpless.

If *John Larsh* had a vested estate, subject to the common rules of inheritance, it must go to his sister *Hannah*, as heir at law of the whole blood.

PRESIDENT. On the questions proposed, my opinion is—

1. That either by the will, or by the act of assembly, this was not a joint tenancy.

2. There might have been room to doubt whether the act of assembly was not applicable only to lands derived from an intestate father. However this may have been; since the case of *Kerlin v. Bull*, it appears, that, by the act of assembly, the son *John* having died intestate, in his minority, unmarried and without issue, the estate descending to him from his father is to be equally divided among the surviving children of his father.

Dall. 175.

WASHINGTON COUNTY,

October Term, 1796.

UNITED STATES v. JACOB WOLF.

1796. *INDEBITATUS* *assumpsit* for 96 dollars and 12 cents, being arrearages of duties on two stills owned and used for the distillation of whiskey, in the year commencing with the 1st *July*, 1793, and ending with the 30th *June*, 1794, and, in consideration of this, laying a promise on 28th *November*, 1794, to pay those arrearages.

1 U.S.L. 319 The duty imposed on stills by the act of congress was not paid in these counties, and the attempts to enforce its payment here, having excited the insurrection, and been rendered effectual by the expedition of 1794, the secretary of the treasury, on the 17th *November*, 1794, considering the hardship of enforcing the payment of all the arrears of duty in these counties, from 30th *June*, 1791, instructed the collectors to receive entries of stills, for the year beginning with the 1st *July*, 1794, and ending with the 30th *June*, 1795, without exacting the payment of any arrears of duty except for the year immediately preceding, that is, from the 30th *June*, 1793, to 1st *July*, 1794, ascertaining those arrears by the capacity of the stills.

2 U.S.L. 95. In consequence of this, the collectors, though the time of entry was past, did receive entries of stills, and, at the same time, took express written promises to pay the arrears of the preceding year. And, in consideration of this entry and promise, past penalties and forfeitures were waved.

3 U.S.L. 321.

2 U.S.L. 98.

3 U.S.L. 90.

1.

But, afterwards, some distillers in *Washington* county fancied, and many were told, that, if there was no office of inspection in that county in the month of *June*, 1793, they were not liable to the duty for the year from 30th *June*, 1793, to 1st *July*, 1794; and if they were not liable, their promise to pay did not bind them.

4 U.S.L. 95.

Many distillers, therefore, who, in *November*, 1794, had entered their stills for the current year, and pro-

misd payment for the preceding, refused to comply with this promise; and, on this refusal, suits were brought against them. 1796.

Among these was *Jacob Wolf*; and, at the trial of this action, the preceding circumstances were proved as to him; and proof was also made of the capacity of his stills; that they were worked in the spring of 1794, and were in the furnace in *August*, 1794; that there was an inspection office opened in *Washington* county in *June*, 1794, and continued in other counties of this survey; and that a demand of the arrears was made of *Jacob Wolf*. A loose piece of paper containing various numbers of gallons of whiskey distilled, but without dates, was offered in evidence for the defendant, but rejected, as not being a book within the meaning of the act of congress. 1 U.S.L. 319.

Brackenridge and *Young* for the defendant. There is no evidence of an inspection office in *Washington* county in 1793, therefore no arrears are demandable for the year 1793-4. If there were a promise, it is without consideration, obtained by misrepresentation, and by taking undue advantage of the defendant's situation.— There was no demand made at the dwelling-house of the defendant. No laws passed after *May*, 1794, are to be taken into view in this action. No advantage can be taken of the penalty or forfeiture of the law of *June*, 1794, but for the purpose of enforcing the payment of duties under existing laws. 2 U.S.L. 95.

Ross and *Campbell*, for the *United States*. In *November*, 1794, the defendant was liable to all past duties, penalties, and forfeitures. If no election be made, the duty is payable on the capacity of the still. The act of 1794, requires an entry of stills, if there be an office within the survey; and makes a personal demand sufficient. This applies to all future demands of past duties. There is a distinction between duties and penalties.— The duties arise from working the stills, or having them erected in stone, brick, or some other manner, whereby they shall be in a condition to be worked. The duties are a debt, though the stills were never entered. The penalties cannot be demanded for not entering, unless an office existed within the legal bounds; but the duty is notwithstanding a debt and payable. And, as the de- 3 U.S.L. 93-95.

1796. *defendant* has shewn no regular book, that debt must be ascertained by the capacity of the still. The distillers have been greatly favoured. The duty for three years might have been exacted, and demand is made for the duty of only one of those three years; and all penalties and forfeitures are waved. Surely here is a valuable consideration for a promise.

PRESIDENT. I will consider this case,

1. As if no express promise to pay had been made on the 28th *November*, 1794;

2. As on this promise.

1. I am clearly of opinion, that, on the 28th *November*, 1794, all duties on stills, not paid, were then due, and might be exacted for three years, from the 30th *June*, 1791, to the 1st *July*, 1794, whether an inspection-office existed in the county or not. The existence or non-existence of an inspection office, only comes in question, when the penalty for not entering is demanded. Both penalty and duty may be exacted. The penalty is *U.S.L.320.* "the more effectually to prevent the evasion of the duty;" and, therefore, as it may be *less* than the duty, cannot be *instead* of it. If on a demand, a regular book had been exhibited, the defendant might have elected to pay according to the quantity of the spirits distilled. But as no book has been shewn, the duty, according to the capacity of the stills, might be demanded and recovered, whether the defendant promised or not; for, if due, the law implies a promise. Of this duty a sufficient demand has been proved; and the defendant must pay it.

2. To understand the express promise, we must take into view, the president's instructions with regard to the country in general, and the instructions of the secretary of the treasury to the collectors, and consider this promise as an execution of these, on the part of the defendant. It is a reasonable, and for him an advantageous execution. The *United States* might have exacted from the defendant the penalty for not entering his stills in *June*, 1794, and might have exacted all past duties, penalties, and forfeitures. Waving these is a good consideration, and the promise is binding.

In either way, there must be a verdict for the *United States*.

The jury found for the *United States* the sum demanded.

ALLEGHENY COUNTY,

December Term, 1796.

PENNSYLVANIA v. THOMAS LEMMON.

AN inquisition of forcible entry and detainer was removed by *certiorari*, and tried at this term.— 1796.
 The entry was laid on 8th *April*, 1796, into 371½ acres of land in *Pitt* township, in the possession of *William Todd*. The land is on the west side of the *Allegheny* river.

On the 15th *March*, 1793, *William Todd* had, under the law of the 3d of *April*, 1792, obtained a warrant for 300 acres of land; and, on the 15th of *April*, 1796, had a survey of 371½ acres made on it. In *May*, 1793, he had a small cabbin built on it, ten feet long, and eight feet wide, not covered, and without a door; and he deadened about three quarters of an acre. In *October*, 1795, he built another cabbin, about one half or three quarters of a mile from the first, fourteen feet long and twelve feet wide, covered with slabs, but without a door; and he deadened about half an acre. This was the evidence of possession by *William Todd*. In the fall of 1795 or beginning of 1796, *Thomas Lemmon* came on this land, to make a settlement for himself, in the terms of the act of assembly, lived some time in the last built cabbin of *William Todd*, and, afterwards, built one for himself, within *Todd's* line, and about three perches from the last mentioned cabbin. 3 St. L. 209.

The evidence of the force was that *Lemmon* stood in the opening of his shed or cabbin, with his gun, and refused to go off unless he were forced off.

Brackenridge, for the prosecution. The survey under the warrant was a complete possession of the land. The circumstances of the *Indian* war rendering it impossible with safety to maintain that possession, the act of 3d *April*, 1792, protects his possession, as if he had actually maintained it; and renders every intrusion unlawful.— 3 St. L. 212.
 Though the two years after the warrant were expired, before any settlement was made, the *Indian* war is an

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apology, and there will be two years given after the war. It is a matter of great importance to determine whether, in case of a forfeiture of a claim under a warrant, for default of settlement in two years, the state only should take advantage by issuing a new warrant; or whether any individual can take on him to make an entry, and proceed to improve and settle.

PRESIDENT. We are not now enquiring who is intitled to the land, but whether *Thomas Lemmon* has committed an offence, by forcibly entering on the possession of *William Todd*; or having peaceably entered on *William Todd's* possession, forcibly detaining it.

It does not appear, that, at the time of *Lemmon's* entering on this land, *William Todd* was in possession of it. Surveying the land, building cabbins, and leaving them unfinished and empty, is not occupying or possessing the land. It seems to have been vacant. Entering on vacant land is not a public offence. And, after such entry, there can be no forcible detainer, for there was no possession in another, at the time of the entry.

Verdict not guilty.

2.Burns 179.
2.Bac. Abr.
858.

SOMERSET COUNTY.

December Term, 1796.

JAMES SPENCER v. WILLIAM TISUE.

THIS was an action of debt for 2000*l.* the penalty on an article of agreement for the purchase of a tract of land, sold by *Spencer* to *Tisue*, for 750*l.*

Of this price, it was admitted, that *Tisue* should have credit for 30*l.* 0*s.* 6*d.* paid by him for goods bought by *Spencer*, and also for the half of 98 dollars and 27 cents, the amount of excise duty on stills sold with the land: and, as to the other half of this duty, it was left to an amicable adjustment on circumstances.

Tisue further claimed a credit for 20*l.* as the price of a set of smith's tools, which, it was proved, he had given to *Spencer*. But there was also evidence tending to prove, that he had given them as a present beyond the agreed price. 1796.

Another credit was claimed for 12*l.* the price of two cows sold by *Tisue* to *Spencer*. But there was evidence tending to prove, that one of the cows was for *Thomas*, son of *James Spencer*, in payment of a debt due by *Tisue* to him.

Tisue produced a receipt to him, given by *Mary*, the wife of *James Spencer*, for 263*l.* 17*s.* 6*d.* Of this sum 226*l.* 7*s.* 6*d.* was actually paid to her, in the presence of *Thomas* and *William*, sons of *James Spencer*, and then of age; and it was then also admitted, that the residue, 37*l.* 10*s.* had before been paid to one of the sons, to buy land for the family. There was also evidence, that *Mary Spencer* had given a receipt for but 226*l.* 7*s.* 6*d.*; that afterwards *Thomas Spencer* had borrowed of *Tisue* 37*l.* 10*s.* to be paid in three weeks; and, he not paying, *Tisue* prevailed on his mother to include this and the other sum, in a new receipt to be given for the whole 263*l.* 17*s.* 6*d.* There was evidence, that, at this time, *James Spencer* had no fixed place of abode; that his wife and family lived in a house near *Tisue's* which had formerly been *Spencer's*; that, of the 226*l.* 7*s.* 6*d.* *Thomas Spencer* paid 158*l.* 17*s.* 6*d.* and perhaps the whole of it, to one *Simeon Rice*, for another tract of land; that *James Spencer* sent word to his wife to buy *Rice's* land, and he would pay the money, if he would sell it on the terms proposed, but there was also evidence, that he did not want to buy this tract, but wished to go to *Kentucky*;—that it was agreed between *Thomas* and his mother, that the money should be paid to her by *Tisue*; that *Tisue* said he had paid the money to her, that she might have a place to live on; that, after they left *Tisue's*, *Thomas* said, his father had discovered something of the matter, and they must start off directly; that his mother, with the assistance of *Tisue* and his wife, disguised herself, that her husband might not discover her; that she declared, she bought *Rice's* land for her husband; that *Thomas* lives on it, has got a deed for it, and says he will keep it; that *William*, with the permission of his

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brother *Thomas*, built a cabbin on the land, that he allowed his father to go into it, and that his father and mother now live in it; and that *James Spencer*, after the purchase from *Rice*, said, if he got the land, he would give *Thomas* a part of it, if he behaved himself like a son. A witness also proved, that he had endeavoured to persuade *James Spencer* and his son *Thomas*, who claimed an interest in this land, as having claimed some interest in the land sold to *Tisue*, to agree about dividing between them the land bought of *Rice*; and, for this purpose, that he run a line dividing it equally; but that neither of them assented to it.

Young and Morrison, for the defendant. The money received by the wife has been applied to the use of the husband. There was a dispute between *James Spencer* and his son *Thomas*, about the property of the land purchased from *Rice*. How could this arise, unless the land had been purchased by *James Spencer's* money. If the money was *James Spencer's*, this admits, that he had assented to the payment made by *Tisue* to *Mary Spencer*. Though a wife can make no contract, yet, in many cases, there is an implied permission of the husband, unless there be an absolute prohibition. Wherever there is this permission of the husband, the wife's contract binds him. There is a plain collusion between the husband, the wife, and the son, to defraud *Tisue*. If the land has been purchased with *James Spencer's* money, the land is his. The whole of this 26*l.* 17*s.* 6*d.* has been laid out in the payment of the land bought of *Rice*.

Nagle, and *Selby*, for the plaintiff. A wife cannot make a contract for a husband. The 37*l.* 10*s.* was lent to *Thomas*, and is no payment to *James Spencer*. The authority of the wife was to purchase on the terms which the husband had before proposed to *Rice*. If she purchased on other terms, he is not bound by the purchase. Therefore the payment to the wife is no payment to the husband. There is no evidence, that the land was bought for the use of the husband. *Tisue* has made a wrong payment, with a fraudulent view to an improper person, and he must bear the loss.

PRESIDENT. The policy of the law is, that marriage unites the two persons in one, sinks the wife in the husband, and gives to the husband the sole right of manag-

ing the property of both. But with this union of persons, it is not inconsistent, that the wife should be the agent of the husband: for this accords with the union of persons, and the agent, like the wife, may be considered as the same person with the principal. 1796.

There are many occasions, on which a wife, as agent for the husband, appears as the principal. The cares of matrimony, the duties of management are divided, the husband assumes some parts, and submits other parts to the care of the wife: where he either acts or submits he is bound. A husband is often from home. Nothing is more common, than to pay to the wife, in his absence, a debt due to the husband. This is for the convenience of both parties; and seems to be considered as an implied agency. If *Tisue* made his payment in this usual way, it seems proper to consider it as a payment to the husband, on a presumed agency, with which, in their common concerns, every wife is generally presumed vested.

But if *Tisue intended*, by paying to the wife, to deprive the husband of that management of the estate with which the law vests him, it is a fraud on the husband, to whom the payment ought to have been made, and is no payment.

But, at the same time, the husband must not be indulged in a fraud on his part. For, if he have afterwards assented to this payment, or it have been applied to his use, and he accepts the benefits of it. This is a payment to him.

In this case, the wife has given a receipt for 263*l.* 17*s.* 6*d.* Of this, it appears, 226*l.* 7*s.* 6*d.* was actually paid to her. There is evidence, of which ye will judge, that 37*l.* 10*s.* also included in this receipt, was previously lent to the son. There is evidence, that 158*l.* 17*s.* 6*d.* part of the 226*l.* 7*s.* 6*d.* was actually given by the wife to the son *Thomas* and paid by him for *Rice's* land, on which the husband now lives, the purchase of which he had contemplated and directed his wife to complete, and interest in which he claims, or has claimed. How the residue of the 226*l.* 7*s.* 6*d.* has been applied, we do not know: but the husband and the wife live together in the same house; and it is said, *Thomas Spencer* has got a deed for the land. *Thomas Spencer*, considering the title in him, has got land for which he has not paid. If

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he shall gain, who shall lose, his father or *Tissue*? The question is whom ye will turn round for remedy. If the land was bought, with *James Spencer's* money, by any agent of his, the land is his. This land he was in treaty for buying, and it was bought by his wife and son, with money paid her in discharge of a debt due to her husband.

What is the value of the smith's tools, and whether that and the price of the cow or cows shall be deducted, you will determine.

The only points in dispute, therefore, are whether the money paid to the wife, the value of the smith's tools, and the price of the cow or cows, ascertaining these sums, shall be considered as payments made by *William Tissue* to *James Spencer* on this contract.

The jury allowed credit for 263*l.* 17*s.* 6*d.* the sum mentioned in the receipt given by the wife of *James Spencer*, and for 15*l.* as the price of the smith's tools, and for 6*l.* the price of one cow.

FAYETTE COUNTY.

December Term, 1796.

PENNSYLVANIA v. STEPHEN MYERS.

MYERS and one *Pratt* were suspected of being concerned, with several others, in horse-stealing and burglary. *Myers* was tried now for stealing a horse. It was proved, that he sold the horse in *Maryland* for 40 dollars, and the owner valued him at 80 dollars.—*Myers* and *Pratt* were both in jail, on a charge of burglary. *Myers* told the owner, that he bought the horse from *Pratt*. *Pratt* was not then present, but, afterwards, when asked by the owner, said, he never sold or gave a horse to *Myers*. At another time, *Pratt* said, he had given *Myers* a horse, which he had bought from a man whom he did not know. And, on the trial, he swore this, and that he had sold him to *Myers* for 30 dollars. Declarations of *Myers* were proved, that he gave 12 dollars to *Pratt* for the horse.

Pratt was committed to answer for stealing this horse. 1796.

Simonson, for the prisoner. The evidence, at most amounts only to proof of receiving stolen goods, knowing them to be stolen; and there can be no conviction on this indictment.

Young, for the state. *Pratt* and *Myers* were confederates in this offence.

PRESIDENT. If *Myers* neither took this horse, nor was present aiding and abetting at the taking, he cannot be convicted on this indictment; for taking is a material part of the larceny. But there is evidence, that *Myers* had this horse; and, from this, it may be presumed, that he took him, unless he can give a credible account of his having otherwise got possession of him. You will therefore consider whether the account, which he has made of this, be credible; or whether, like the fable of the two thieves and the butcher, it be one of those tricks, which sharpers and thieves use, to cloak their common villany.

Verdict guilty.

Simonson, moved for a new trial on two grounds;— 1. that the verdict is contrary to evidence; and, 2, that the direction to the jury was wrong.

PRESIDENT. 1. The jury had evidence, on which they might find the verdict, as they found it. The direction stated this to them. 2. We are yet of the same opinion we then gave.

ALLEGHENY COUNTY,

March Term, 1797.

WILLIAM McLAUGHLIN v. GEORGE THOMSON.

THIS was an action of *indebitatus assumpsit*, for work done, in digging a mill-race. The defence was, that the work was unskilfully done, contrary to the directions of the employer, much to his injury, and unfa-
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nished in depth. The plaintiff contended, that when a mill-race was to be dug any certain depth, in declining ground, its depth is to be measured by laying a board across the race, and measuring its depth from the middle of its width.

PRESIDENT. When it is agreed that a race be dug through declining ground, to be of a certain depth, this depth must be measured from the lower brink, and the bottom be made level, so that when there is an inch of water at the lower side, there shall be an inch every way across. A race three feet deep must be a race that will contain every where three feet depth of water.

WESTMORELAND COUNTY,

March Term, 1797.

JOSEPH DIXON v. CHARLES M'CLUTCHEY.

ASSUMSIT, on an undertaking, in the sale of a horse, that the horse was sound, with an averment, that he was unsound of the yellow-water, and thereof died. There was another count of *indebitatus assumpsit*, for money had and received.

There was evidence on both sides.

PRESIDENT. 1. There is no express warranty or undertaking. The price is less, than of a sound horse of the same appearance. There is evidence, from a conversation between the parties at the sale, that it was understood by both, that the horse might be unsound. The plaintiff therefore took his chance, and cannot recover, on the first count.

2. But fraud vitiates every contract, and one man, who sells a horse to another, knowing a material defect, which in equity and good conscience he ought to disclose, and does not; if it be not known to the buyer, or such as a buyer of common prudence must be presumed to know; this is such a fraud as vitiates the contract, and the buyer may call for his money again.

Verdict for the defendant.

JOSEPH COOK, assignee of ROBERT LAUGHLIN, v.
JOHN AMBROSE.

DEBT on a bond of 300*l.* dated 12th April, 1790, conditioned for the payment of 30*l.* with legal interest for the same, on 1st April, 1795, assigned 12th March, 1794; and on another bond of the same date, for the payment of 30*l.* on 1st April, 1796, with legal interest on the same, also assigned 12th March, 1794. 1797.

Young, for the defendant, offered to prove, that the agreement was, that interest should not be paid from the date, but from default of payment on the day prescribed. And he observed, that the obligation is not to pay the money with interest *from the date*, but *with legal interest for the same*. This is inserted ignorantly and without necessity, as we sometimes see inserted, with interest *from the time of payment, if not then paid*.

Armstrong objected to this testimony, as contradicting a deed, by parole testimony.

PRESIDENT. In the case of *Moses v. McFerlan*, it is stated, that an agreement was made, that the indorsement then made on a note, to enable the indorsee to recover in his own name, against the drawer should not be used against the indorser, and that, contrary to this agreement the indorsee sued the indorser, in the court of Conscience, that the indorser set up this agreement, and the court of Conscience rejected it as a defence against a suit there on the indorsement; and the court of King's Bench held, that the court of Conscience did right; but that this agreement was a ground of action of *indebitatus assumpsit*, to recover back the money. I do not say whether this is, or is not, a similar case. This is no collateral matter. Neither was that. The one is a fraud. The other is a mistake in the original transaction. This court has jurisdiction over the demand and the defence. The practice here on our act of assembly, in admitting defences against assigned obligations is more favourable to the defence, than in *England* on the act of parliament. I hardly think the principles of our practice justify allowing against an assignee any defence not arising out of the original transaction, or the framing of the oblig-

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*See Davis v.
 Cammel ante
 233.*

ation, or subsequent direct payment. No fraud is suggested in *Laughlin* or *Cook*, but a mistake common to both the original parties, which it was as much the business of *Ambrose*, as any other, to prevent or correct. As he did not prevent or correct this mistake, but signed the bond, and gave it a currency, why should not he take the consequences, rather than *Cook*, who must now be considered as a *bona fide* assignee for a full consideration. Whether the proof be admissible seems to depend on what is the clear exclusive meaning of the words "*with legal interest for the same.*" There would be no reliance on written contracts, if their plain meaning may be contradicted by parole testimony. If, exclusively of any other, their meaning be the same as of *with interest from the date*, the evidence seems inadmissible. Whether or not this be their meaning, we will hear you argue.

Young, for the defendant, declined any further argument, and, by consent, there was a verdict and judgment for the plaintiff.

ALLEGHENY COUNTY.

June Term, 1797.

PENNSYLVANIA v. CHARLES KERR, RICHARD M^cANULTY, JAMES M^cANULTY, and JOHN M^cANULTY.

THIS was an indictment for a riot in assaulting and beating *William Stuart*.

John M^cAnulty was an apprentice to *William Dunning*, and run away from his service. *Dunning* published an advertisement of his escape, offering a reward for taking and securing him. *Stuart* went with the advertisement, to the house of an uncle of *John M^cAnulty*, about eight or nine of the clock, in the evening of the 31st December, 1796; there found *John M^cAnulty* in com-

pany of the others indicted; and seized *John*, on the authority of the advertisement, as a runaway apprentice. *Stuart* swore, that *John McAnulty* and the others beat, kicked, and bruized him. 1797.

Brackenridge, for the defendants, objected to shewing the advertisement, and contended, that the master could not give authority by advertisement, to take his runaway apprentice; for "an act for the regulation of apprentices" points out a particular proceeding in case of apprentices absconding. At common law, the master himself might take the apprentice, but could not enter the house of another, and take him by violence. Even an officer with process cannot break open a door. The master has an action on the case. 1 St. L. 540. 541. Ib. 542.

Galbraith. This objection, which might be made by the owner of the house, lies not in the mouth of the defendants, who were not the owners.

PRESIDENT. If Mr. *Brackenridge* require it we will reserve the point; but, at present, we have little doubt. At common law, a master had a right to take up his runaway servant; and, for this, as for any other lawful purpose, might enter peaceably into any house, unless forbidden by the owner. Any person with authority from the master might do the same. If he abuse this authority, he is answerable. An advertisement is a general authority; but he who acts under it, does so at his peril; that is, he runs the risk, that the advertisement is genuine, and that its publisher had authority. The domestic authority of parents and masters must be supported, as essential to the peace of society, and contributing to a due subordination to the authority of government. The act of assembly does not change the common law, but gives a further remedy.

This point was not further pressed. But, there being evidence for the defendants, contradicting the force sworn to, the jury returned a verdict, not guilty.

1800-1801

HIGH COURT OF ERRORS AND APPEALS,

At Philadelphia, July, 1797.

ANNE M'PHERSON, widow, *et al*, devisees of ROBERT
M'PHERSON, *v.* ALEXANDER M'PHERSON.

IN an action in partition brought in the Common Pleas of *Chester* county, and removed into the Supreme court, on a case stated, it was submitted to the Supreme court to determine, whether *Alexander M'Pher-son* and *Robert M'Pher-son* were tenants in common or joint tenants, under the will of *John M'Pher-son*. If they were joint tenants, there was to be judgment for the defendant; if they were tenants in common, there was to be judgment for the plaintiffs.

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The opinion of the Supreme court was, that they were joint tenants; and judgment was entered there for the defendant.

On this, a writ of Error was brought; and the case appeared as follows:—

On 23d *November*, 1762, *John M'Pher-son* made his will, which, after directing all his debts, &c. to be paid; giving his wife 100*l.* with all his furniture (except the clock) his sorrel mare, a lodging room, the keeping of one cow, and provision necessary for her table during life; and directing, that, if she marry, she should then quit her claim to the lodging room and table necessities; proceeds thus:—"I give and bequeath to my son *Alex-ander*, the plantation whereon I now dwell, to him and to his lawful heirs, also my clock. I give to my son *Robert* the plantation whereon he now dwells, to him and to his lawful heirs and assigns. *Item.* I further give

1797.



and bequeath to my sons *Alexander* and *Robert* all that plantation or tract of land I purchased from *Samuel Williams*, to them and their lawful heirs and assigns, to be in full possession of the said *Alexander* and *Robert*, until such time as my son *John* personally appears, and demands the said plantation; and when he does appear, and demand the said plantation, then it is my will, that my sons *Alexander* and *Robert*, or their lawful heirs, do peaceably and quietly yield and give up the same to my son *John*. I give to my daughter-in-law *Sarah* 10*l.* to be paid in one year after my decease. And, if any money is remaining of my personal estate, after my said legacies and bequeathments are fully paid, then it is my will, that the same be equally divided between my wife and my sons *Alexander* and *Robert*. I order and appoint my wife and my sons my sole executors, &c."

His son *John* has not yet returned, nor is it known what has become of him, *Robert* made a will, and devised his real estate to his wife and children. He died. They survived him, and are the plaintiffs in the writ of Partition, and the writ of Error. *Alexander* is the brother of *Robert*, and claims as joint tenant under his father's will and survivor.

Wilcocks and *Tilghman*, for the plaintiffs. The rules *Burr.* 1541, 1570, 1579, 1581.—2*Bur.* for construing wills are the same at law as in equity.—*1112.*—2*P.* In equity, joint tenancy is said to be odious. It is settled, *Wms* 673. that the intention of the testator prevails, if not against any rule of law. And tenancy in common will rather *3 Burr.* 1541. be favoured, than joint tenancy. The court will pre- *3 Burr.* 233. sume a tenancy in common, unless there be plain words *3 Bac.* 198. to the contrary. *Moor.* 558. In a case, where the legal words make a joint tenancy, *1 Vern.* 353. lord *Mansfield* relies on the circumstance of the testator *1 Ves.* 166. having a pride in his family; and, without any words *2 Ves.* 258. shewing a tenancy in common, it has been construed *3 Atk.* 734. from the circumstance of money being advanced by both. *1 Wils.* 165. It is doubtful, whether, by *lawful heirs*, an estate tail is *1 Salk.* 158. not created. *1 Eq. Ca. Abr.* 293. *3 Burr.* 1581. *2 Ves.* 258. *1 Ves.* 521.

In this case, if the devise to *Alexander* and *Robert* had stopt at giving the estate, it might have been more doubtful. The subsequent words shew, that a tenancy in common was intended. This plantation was to be in the full possession of both, until *John* shall demand it. If,

during the life of both, *John* demand it, *both* were to give it up. If, before *John* demand it, either or both die, the words are not, the survivor or his heirs shall give it up to him; but that they or *their* heirs shall give it up to him. This, *reddendo singula singulis*, plainly implies, that the heirs of both might be in possession; and this could be only by a tenancy in common. These words are equivalent to a devise to them and their heirs *respectively*. It is not necessary, that there should have been words to shew, that each should hold in severalty: there are none such in any tenancy in common. They hold *per my et per tout*, till an actual division is made.

1797.

The testator seems plainly, from the whole will, to have intended a perfect equality to his sons, *Alexander* and *Robert* and to have intended an equal provision, out of his real estate, for his absent son *John*, if he should return. He makes his two present sons executors. All is impartial; and it cannot be supposed, that he could have intended, that if, as in the present case, one of his sons, leaving a numerous family of children, should die before the other, the survivor should enjoy two-thirds of the estate. He intended an equal share to each of his children, and that each should transmit this share to his descendants. The court will give effect to this just intention, and declare this to be a tenancy in common.

T. Ross, for the defendant. I admit, that the intention of the testator, governs the construction of the will, where it is not contradicted by any express rule of law. But this intention must be collected from the will itself, and not from extraneous circumstances. The words *equally to be divided*, or *share and share alike*, or to them and their heirs *respectively*, have been sufficient to make a tenancy in common.

2 Atk. 121.
L. Ray 692.

An estate in joint tenancy is created by a grant to two and their heirs. The general presumption is in favour of joint tenancy, unless there be words shewing a different intention. The clause in this will is, "I give to my sons *Alexander* and *Robert* all that plantation, to them and their lawful heirs." This is clearly a joint tenancy, and, had he stopt here, there would have been no doubt. What is there, in the subsequent words, to change this construction? The object of the testator, in this clause, was a provision for *John*, not for *Alexander* and *Robert*, and their children.

2 Comm. 179.
81.

1797.

It does not appear which was the eldest, whether *Alexander* or *Robert*; and, if it did, it could not effect the construction.

Though courts may lean to tenancy in common, it is always on necessary inference from the words of the will, not from surmise. To found a construction on any other presumptions than those to be drawn from the will itself, is to make a will; and to do so in this case would be to make a will for a man who died thirty-five years ago.

The court of Errors and Appeals held this to be a tenancy in common, and reversed the judgment of the Supreme court. But in this they were not unanimous. Their opinions were somewhat as follows:—

SHIPPEN and COXE, J. held it to be a joint tenancy.

1. Here is a clear joint estate vested in *Alexander* and *Robert*; and it cannot be divested without a clear intention expressed.

2. No such clear intention appears, nor any clear intention, that this should be a tenancy in common.—The words, used in creating the obligation to surrender, are the same as those used in creating the estate. They are therefore to be construed in the same way in both parts of the will; and the meaning is, that whoever, under the will holds the estate at the time of the demand, shall then surrender it.

3. As to equality, this construction equally secures it: for either had an equal chance to survive the other.

CHEW, President, and SMITH, ADDISON, HENRY, and RIDDEL, J. held this to be a tenancy in common.

1. It appears, from the whole of this will, that equality between the two sons *Alexander* and *Robert* was intended. And supposing, in respect of age and health, their chances equal, the equality ought to be construed a real, and not a casual equality.

2. Courts in *England* have gradually inclined to construe in favour of tenancy in common; and, from this progress of judicial opinions there, and the state of property here, we ought to lay hold of every possible construction, to make it a tenancy in common.

3. The natural, if not the necessary construction of the direction, that his sons *Alexander* and *Robert*, or their heirs, should give up the plantation to *John* is, that his

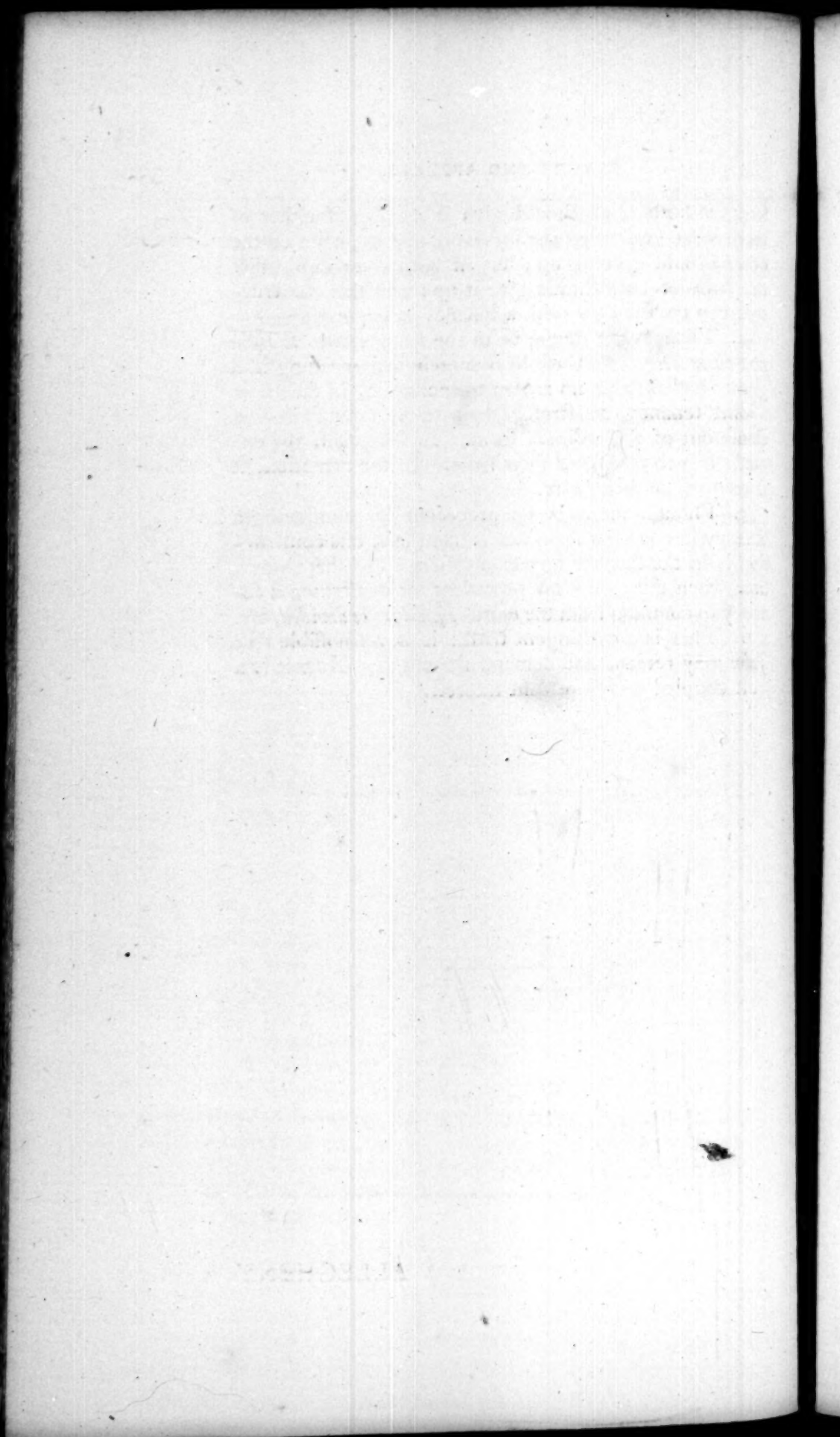
sons, if both alive should give it up; or if either of them were dead, that the survivor, and the heirs of the other should give it up; or, if both were dead, that the heirs of both should give it up: and this construction can consist only with a tenancy in common.

1797.

4. Though the devise be in the same words *to them and their heirs*, yet these have a technical meaning in a grant, and there is no reason to incline us, in favour of a joint tenancy, to stretch them to the same sense in a clause out of the ordinary form. In the grant, the expression is to them *and* their heirs. In the condition, it is to them *or* their heirs.

5. Though there be no precedent for construing a tenancy in common from words like these, this construction is in the spirit of former decisions; and there was a time when there was no precedent for construing a tenancy in common from the words *equally to be divided, &c.*

6. This is a contingent trust: it is yet possible that *John* may return, and demand the estate. Now it is a trust coupled with a present interest.



ALLEGHENY COUNTY,

September Term, 1797.

PENNSYLVANIA v. CHRISTIAN BUGHER, DAVID
GILLILAND, BARNABAS GILLILAND, and WIL-
LIAM RYAN.

THIS was an indictment for a riot, on 2d *March*, 1797, in assaulting and threatening to shoot *John Watt*, and in burning his house. The prosecutor claimed a tract of land of 329 acres, west of the *Allegheny* river, surveyed 3d *May*, 1794, on a warrant dated 14th *February*, 1794; and built a cabin, and proceeded to clear land, and make improvements. The defendants were settlers, who, in *March*, 1796, presuming all warrants forfeited, went over the river to improve land, as the expression is, and gain a title by settlement. *Bugher* improved, built a cabin, cleared, and fenced, and lived within the survey, under which *Watt* claimed. Evidence was offered, that *Bugher* made lines round his claim, improved, and resided on it. 1797.

Woods, for the prosecutor, objected to any evidence of title or possession, because *Bugher* had no right to use force. His remedy was by indictment for a forcible entry: and any force by the defendants was a riot. 3St. L. 209;

Brackenridge, for the defendants. Force to a certain reasonable extent is lawful in defence of one's possession. 1Hawk. 294

PRESIDENT. It is proper to permit *Bugher* to shew, that he had a possession circumscribed by reasonable limits.

Evidence was then given, that *Bugher* had found old lines round his improvement, and intended to claim to them, expecting to hold 400 acres; that he settled on it in *March*, 1796, with his family, has lived on it since, built a cabin, and cleared, fenced, and planted a field of six or seven acres.

1797.

It did not appear, that *Watt* had made any improvement on the land surveyed for him, when *Bugher* went to improve there. *Watt's* cabin was about an hundred perches from *Bugher's*. There were rails cut, and brush-heaps, before *Watt* came on the ground where he cleared.

The defendants came to *Watt's* cabin, ordered him to leave it, felled trees on it, threatened to shoot him, (one of them had a rifle gun) threatened to fasten him to a log-chain, and drag him with a horse out of the lines, and they set fire to his cabin, and burnt it.

Brackenridge. The act of 3d April, 1792, makes warrants void without settlements in two years. A man may keep others off from his own possession.

Woods. *Watt* had a right to enter peaceably on his own land, to make his settlement required by law.—Whatever *Bugher's* claim may have been, he is not justifiable in using force, in taking possession. Any violent execution of a private enterprize, whether lawful or unlawful, is a riot.

1 Hawk. 274,
293 4.

PRESIDENT. To burn a house, the habitation of a man, and with a man in it, is an outrage not to be justified.

Verdict, that *David Gilliland*, *Bugher*, and *Ryan* are guilty.

NOTE.—There was another indictment, of a similar nature, against *David Gilliland*, and *Barnabas Gilliland*, for assaulting *Thomas M'Connel*, breaking open his dwelling house, throwing out his goods, and throwing down his house. *M'Connel* claimed under a warrant. *B. Gilliland* claimed by settlement. The jury found *David Gilliland* guilty.

PENNSYLVANIA v. JOHN HUSTON, DANIEL CARTER, and WILLIAM WILSON.

THIS was an indictment for a riot, on 9th January, 1797, in besetting the dwelling-house of *Felix Welsh*, assaulting and beating *James Welsh* and *Thos. Welsh*, minor children of the said *Felix*, throwing his goods out of doors, and demolishing his house.

In the spring of 1793, *Huston*, one *Myers*, and others went to look for land to settle on. In the spring of 1794, *Myers* raised a cabbin. *Huston* bought it from him, and, about *February*, 1796, built a cabbin, cleared a field of about four acres, planted it with corn, cleared upland, sowed it with wheat, worked on it constantly, when he was not working with others, agreed with the neighbours as to boundaries, but run no lines. 1797.

In *March*, 1796, *Felix Welsh* came with his family, to settle in this neighbourhood; found a cabbin, went into it, and lived in it. On his way thither, he was warned by *Huston*, that he should not come lower down, than this old cabbin. Next winter *Ennion Williams* (agent to the population company, under whom *Welsh* claimed) assisted *Welsh* to build another house, about twenty perches further down, on the corner of three tracts so that his improvements should lie on each of the three. *Welsh* went into this new house with his family; and while he and his wife were absent, the defendants came, threw the beds, in which were some of *Welsh's* children, out of doors, threw out also what things were in the house, and threw down the house.

PRESIDENT. A surveyor, if justifiable, surely cannot be compelled, to make a survey without a warrant, unless there be an *actual settlement*. An actual settlement is to be considered as meaning the same thing in the act of 3d *April*, 1792, as in the act of 30th *December*, 1786; 3 *St. L.* 209. "an actual personal resident settlement, with a manifest 2 *S. L.* 488. intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, &c. The law of 1792 3 *St. L.* 212. seems to justify defining an actual settlement to be a clearing, fencing and cultivating at least two acres for every hundred claimed, and erecting thereon a messuage for the habitation of man. Such settlement with a residence of five years intitles to a patent on the payment 3 *St. L.* 210. of the fixed price. A warrant operates against a settlement from the date of its entry with the surveyor.— There was a survey of this land in 1795, on a warrant under which *Welsh* claims. There was no settlement by *Huston* till 1796. A settlement had been begun, but not accomplished before; and if the excuse of war will save the settlement, it saves the warrant; and the

1797.

warrant was entered before the settlement was completed. The clause excusing settlements, in case of war, and persisting in endeavours to make them, ought to be construed *reddendo singula singulis*. The actual settler who has made a settlement is excused from *continuing* it, if he be driven therefrom by force of arms of the enemies of the *United States*. The grantee by warrant is excused from *making* an actual settlement, if he be prevented from making such settlement by such force.

The law has in view two sorts of actual settlers; one deriving title from their warrants, the other from their settlements. Both titles are to be equally protected, because both are equally lawful. The one settler begins his title with money, and must complete it with labour. The other begins it with labour, and must complete it with money. Money is the fruit of labour. Whether the title be begun with money, or with labour, the settlement of the country is provided for. But when these different titles interfere, which shall give way? The warrant excludes the settlement, only from its entry with the surveyor. But before this entry, the grantee has paid his money, perhaps the savings from the labour of years, into the Land-Office. And in the mean time, perhaps between the date and the entry of the warrant, another goes and makes an improvement on the land. Which title shall give way? If the improver has so far proceeded, as to have made an actual settlement, the grantee must lose his money, and drop his claim. But if the improver has not so laboured as to have made an actual settlement; why, since one must lose, may not he as well lose his labour, as the grantee lose his money?

But there was no survey for *Huston*, and therefore we know not whether this house was within his claim; nor, if it was, whether his claim ought to have included it; for he may have claimed more than 400 acres, and so had no right to exclude other settlers. A man in actual possession of part is in possession of all the rest of only his lawful claim. If a man settles on land without any survey, he may perhaps make vague boundaries inclosing a thousand acres; while he is intitled to only four hundred. This can never be supposed to be such a possession as will exclude others from settling within such claim.

Huston, therefore, having no survey, ought not to have used the force of demolishing the house; but ought to have proceeded to ascertain his right, and prosecute it in a legal way. 1797.

If no more than one was concerned, all must be acquitted.

The jury found a verdict—not guilty.

Lessee of WILLIAM DICK v. GILBERT CAMERON.

EJECTMENT for 400 acres of land on *Watson's* run. This was for land west of the *Allegheny* river, and the claim on both sides was, as actual settlers, under the law of 3d April, 1792.

The evidence for the plaintiff was as follows.—*William Watson*, a mill-wright, while engaged in building a saw-mill for *David Mead* at *Meadville*, in 1793, made an improvement, about five miles thence, cut down some trees, deadened some, and put his name on a tree, without intending to live there; and sold this improvement to *William Dick* for 3l. *Dick* came to *Meadville* in 1794, lived there, and followed his trade of a carpenter. In June, 1794, he built a cabin, 16 by 14 feet, near *Watson's* improvement, put the ribs on, but did not finish it. It was common for the inhabitants of *Meadville* to go out in companies armed, and make improvements. They did not confine themselves to one improvement for each. In 1795 the *Indians* killed two men, about five or six miles from this improvement, and one man near the town.

Brackenridge, for the plaintiff, offered to prove a survey made for *William Dick*.

Woods objected to this, until a warrant, or an actual settlement, were first proved. 3 St. L. 211.

Brackenridge. What is an actual settlement? It is inconvenient to say, either that the first act of labour should be sufficient, or that actual dwelling on the land should be required. We ought to take an intermediate state,

1797. The act of 1786 is to be understood as applicable only to the subject then in view, to protect settlements formed. In early times in this country, county courts protected improvements to a wild extent, even the marking of a name on a tree. When the judges of the Supreme court came out here, the chief-justice, a lawyer from *Delaware*, unacquainted with the land decisions of *Pennsylvania*, and with any thing but paper titles, went to the contrary extreme, and excluded all evidence of improvement. Alarmed at this, in the assembly of 1786, I introduced the law protecting settlements. And since, even in cases commenced before that law, the chief-justice and the judges of the Supreme court have changed their principles, and have declared that settlements give title, and that they would decree a warrant.

2 *St. L.* 488. But the expressions in the law of 1792 are not to be controlled by the law of 1786, but to be explained by what the legislature of 1792 intended to accomplish. Their intention was to give land to those who should expend labour on it. How was this to be done? The settler must first go and explore the country, then select a spot, and set a mark on it, put his name on a tree.— This ought to be respected by every other, and be protected. He would next deaden the trees, and so proceed in a series of acts, all which taken together, the jury, with chancery powers, will declare to be a settlement. And we must begin with the first act, and detail the progress till the settlement is accomplished. The survey ought to be the first act. The man is on the ground. And he ought to have it in his power to require the surveyor to mark his boundaries, in order to keep off others.

Woods. Those who take out warrants are actual settlers, as well as those who begin by improvement; for they must make an actual settlement within two years. 3 *St. L.* 212. The improver begins by improvement and settlement, and must take out a warrant in ten years. The object of both is to effect actual settlements. The argument on the other side is calculated for the protection of *land-jobbing* improvements. The act requires the surveyor to survey only for those who have made actual settlements. No lands are protected against warrants, but such as are actually settled.

3 *St. L.* 210-1.

Brackenridge. I agree with all that has been said, and offer the survey as proper evidence in part. But it will fail unless we can shew a settlement. 1797.

PRESIDENT. No doubt this may be proper evidence in part ; but the proper order is to prove an actual settlement first, and, having done that, then to prove a survey. The question whether an actual settlement has been made, involves a point of law to be determined by the court. Whether the party has done certain acts, is a question of fact, which the jury must decide. Whether those acts amount to an actual settlement is a question of law which the court must decide.

It was then proved, that, in *June, 1795, Dick*, with other improvers assisting him, made between 300, and 400 rails, put them up in a fence, four rails high, inclosed about one-third of an acre, dug it with a hoe, planted corn, potatoes, and garden-seeds, and returned home to *Meadville*.

Brackenridge then proposed to prove, that, in *September, 1795, Dick* put another person on this land, as his agent, to improve for him.

Woods objected to such testimony. No person, who has not a warrant, can, under the act of 1792, derive a title from a settlement, unless it be made by himself. The grantee of a warrant may either make or *cause* to be made, the actual settlement required. The improver without warrant must *make* an actual settlement.

Brackenridge. The distinction is too ingenious, and favours more of the casuistry of the schools, than the sound deductions of reason. This could not be the meaning of the legislature. Law is founded on reason, and on various other grounds, one of which is principles or maxims. This is one of the noblest grounds of the law; and one maxim is *Qui facit per alium facit per se*. It must have been the intention of the legislature to provide for those who are not able to supply themselves with provisions, and might wish to engage as agents to others for money, or a part of the land. It is true the law has been abused, by the appropriation of many tracts by means of agents.

Woods. Those agents and their employers can be equally provided for, by supposing the title vested in the agent, under an agreement to convey to the employer.

1797.

PRESIDENT. The law of 1792 has it in view to accommodate two different descriptions of persons; those possessed of money, which they were desirous to employ in the purchase of even more land than they could occupy themselves; and those who, without money, were desirous to appropriate to themselves a tract not exceeding 400 acres of land, as a residence and fund of subsistence. This law, therefore, has two objects, to increase the money in the state treasury, and to settle the frontier lands. Whether these views of the legislature be so compatible, as to be effectually and beneficially pursued together, and which, when they clash, ought to be favoured, some may doubt.

However this may be, vast quantities of land have been appropriated or claimed by individuals, by both methods. The claim by one man of any quantity, however great, by means of money, was plainly within the view of the legislature, and is sanctioned by this law. The claim, by one man, of any quantity exceeding 400 acres, by means of labour, was not within the view of the legislature; and having been made in a manner, and to an extent, amounting to an abuse of the law, we ought to lay hold of any words in the law to restrain it within the bounds which the law meant, 400 acres.

We have, on former occasions, expressed an opinion, from which we now see no reason to depart, that it will best accomplish the objects of the law, to say, that no title shall be derived from a settlement, but to the person by whom the settlement was made; and that the survey ought to be made for the resident settler, and not for the employer. The surveyor is to survey for him who *has made* the settlement. The grantee of a warrant is to make, or *cause to be made*, the settlement. As these words will justify this construction, if this construction will best effect the views of the legislature, (and we think it will) the construction of the law ought to be limited by these words.—The law will then stand thus. He who would appropriate land by means of labour, must limit his claim to 400 acres; the labour must be exerted by him or under his direction; he must reside on this land, and make it the residence of his family. If any man would appropriate to himself more than 400 acres, he must begin with money, and take out a war-

3 St. L. 211-2.

3 St. L. 211, 212.

rant. He who would appropriate land by money, may appropriate to himself any quantity whatever, for which he can purchase warrants, and proceed to make or cause to be made the settlements required by law. Thus the rich are permitted to engross land, only by means of money, and an opportunity is left to the poor to provide a competence, by means of labour. But if the rich were permitted to engross both by money and by labour; the poor would be excluded from all means of procuring land.

1797.

But however this might incline us to consider the testimony as improper, we will not so far determine the point as to exclude it. We will therefore receive the testimony, but under this condition, that, if there be a verdict for the plaintiff, the defendant shall have leave to move to set it aside on this ground, and to have judgment of nonsuit entered.

Evidence was then given, that, in *September, 1795*, *Dick* put one *Musbrush* in possession of this land, that there were then less than an acre in corn and potatoes planted in the spring before, and, though no cabin was near this, there were three on this tract of land, two of which were understood to have been built by *Dick*; that *Musbrush* and his son went into one of them, but that his family was not in that part of the country; and that he cleared, and burned brush; that in *March* or *April, 1796*, he was clearing, had about four acres cleared, and had timber cut for rails; that *Dick* then went to warn *Cameron* off; that *Cameron* was not then on the place, that he claims two or three other places, and has two sons, one grown up fit for a man's work, another not so, and that his wife resides in *Meadville*; and that one *Jackson* was then on the place.

Brackenridge then offered to prove, that *Dick* had made a survey round this land.

Woods objected, because no actual settlement had been made.

PRESIDENT. If the survey was made during the time that *Musbrush* was resident on the land, it may be given in evidence as an act of his or of *Dick*, circumscribing the boundary of his settlement then begun and prosecuting.

1797.

A witness then swore, that, in *April, 1795*, he run the closing line of a survey for *Dick*.

On the part of the defendant, it was proved, that, in *August, 1793*, he raised a house on the land, that another cabin was built on another place for his son, a working lad; that the *Indians* were troublesome, and he left that part of the country, and went to *Northumberland* county, where he had his family; that, in spring 1794, he prepared to remove with his family, which, being large, he could not take over the mountains then, left them on the west branch of the *Susquehannah*; that he proceeded with his eldest son, lived in the cabin, and worked on the land; that, in harvest, he returned, and brought up his family to *Pittsburgh*, where he said he would leave them, till the *Indians* were settled; that, in *May* or *June, 1795*, he with others planted an acre of corn and potatoes, digging the ground with their axes; that, before *Mushrush* came on the land, or into that part of the country, *Cameron* had put one *Jackson* on it for him; and that *Jackson* has continued to live on it ever since. It was also proved, that *Mushrush* worked on another place, but resided generally near *Pittsburgh*; that among the company with whom *Dick* went in 1794 to make improvements, it was agreed to draw lots for the improvements; that *Dick* drew that near *Cameron's* cabin; that they knew of *Cameron's* cabin, and several other cabins; that they declared, if those who had made the cabins returned, they would give up their claims; and that *Dick* has another improvement, and lives with his family at *Meadville*.

PRESIDENT. It does not appear, that any one for *Dick* lived on this land, before *Mushrush*; and before him, *Jackson* was placed on the land, and has continued to reside on it, in opposition to *Dick*.

Verdict for the defendant.

MARCUS HULING v. ISAAC CRAIG.

THE plaintiff had undertaken to carry a quantity of provisions for the troops, by water, from *Pittsburgh* to *Fort Le Boeuf*. When at *Fort Franklin*, he found *French-creek* so low, that he did not proceed fur-

ther. The defendant was obliged, at a great expence, to employ pack-horses, to carry the cargo from *Franklin* to *Le Bœuf*. This action was brought for the freight from *Pittsburgh* to *Fort Franklin*; and, against this demand, the defendant set up the extra expence of land carriage from *Franklin* to *Le Bœuf*.

PRESIDENT. It must be impossibility, not difficulty, that will excuse from performance of a contract. If complete performance become impossible from a cause not within the power of man to control, the loss ought perhaps to be divided.

1797.

WESTMORELAND COUNTY.

September Term, 1797.

DANIEL St. CLAIR v. DANIEL JONES.

CASE for enticing away and harbouring a servant boy.—

Young, for the plaintiff, offered an indenture signed by the plaintiff, purporting to be a binding of a minor boy, by his guardian, to the plaintiff.

Semple, for the defendant, objected, because it was signed only by the plaintiff, and not by the guardian.

Young. We will prove, that an exact counterpart of this was executed by the guardian.

PRESIDENT. The testimony cannot be received.— But, if you please, we will reserve the point.

Young then offered to prove by the guardian, that he did execute a counterpart of this indenture.

PRESIDENT. This cannot be admitted, unless its loss be proved. We will reserve this point also if you please.

Young then offered to prove, that the guardian did bind the boy to the plaintiff.

PRESIDENT. This must be rejected, as the other evidence was; since you have stated that a deed existed.

The plaintiff was then nonsuited, with leave to move to set the nonsuit aside,

HENRY MILLER v. JOHN PROBST.

1797.

THIS was an action of debt, for the duty on two stills had, owned, and employed by the defendant, on 30th *June*, 1795, for one year then past.

There were separate certificates of the entry of two stills for the year 1794-5, dated 12th *December*, 1794; and annexed to one of the certificates was the following note, signed by *John Probst*:—"Due for the last year's arrearages 45 dollars and 68 cents, on both stills taken together."

Young, for the defendant, urged, that *John Probst* had not the stills, in the preceding year; and that the plaintiff cannot recover unless proof be made, that he had the stills within that year. Where no consideration is stated or proved, the promise, except in mercantile transactions, is not binding.

Eff. 94. **PRESIDENT.** Although *John Probst* had not the stills, another might have had and worked them, in 1793-4; and the duty was then a lien on the stills. To relieve his stills from this liability, *Probst* might have undertaken to pay the duty. This seems to be the result of a settlement of an account between the parties, when all circumstances may be supposed to have been understood, and a balance struck. The note is *prima facie* evidence of a demand on *Probst*. He may controvert it, by shewing fraud, want of consideration, &c.

There was a verdict for the plaintiff.

FAYETTE COUNTY.

September Term, 1797.

WILLIAM DEHART v. JEREMIAH GARD.

AN action of debt on a bond of 82*l.* proclamation money of *New-Jersey*, dated 21st *November*, 1775, conditioned for the payment of 41*l.* 5*s.* 4*d.* with interest from the date, was brought to *December* term, 1793.

There was an indorsement, without date of a credit of 7*l.* light money. The parties both lived in *New-Jersey*, at the date of the bond; but immediately afterwards, the defendant removed to this country. 1797.

Simonsen, for the defendant, relied on the presumption of payment, from length of time, and some light circumstances 1 Burr. 434. Cowp. 109.

Young, for the plaintiff, opposed to this the intervening war, and the defendant's removal to this country. 1 T. Rep. 270.

PRESIDENT. The opinion of justice *Buller*, in the case of *Oswald v. Legh*, seems to set the law on this subject on proper grounds. That was a far stronger case than this. This is a bond of but eighteen years standing. A war of eight years had just commenced before the date of the bond, and seemed soon to destroy all property, confidence, and credit. Paper money rendered it dangerous for any creditor to demand a debt. The defendant left *New-Jersey* immediately after. The presumption ought to be strong indeed, to counteract all these circumstances. 1 T. Rep. 270.

Verdict for the plaintiff for 8*l.* 1*s.* 4*d.*

PENNSYLVANIA *v.* JOHN OLIPHANT and ANDREW OLIPHANT.

INDICTMENT for a nuisance in obstructing a water-course, so as to overflow an high way.

The obstruction was a dam for a forge. It did not appear, that the road had ever been laid out by any authority.

Young, for the defendants, objected to going into any evidence, until a copy of the order of the court of Quarter Sessions, confirming the road, should be produced.

Galbraith, for the state, gave up the prosecution, and assented to a verdict of acquittal.

ANDREW HUSTON v. ROBERT AYRES CLERK.

1797.

THE plaintiff declared for 50*l.* as a penalty for marrying his daughter, *without having a certificate of his consent.*

PRESIDENT suggested, that the 1st section of the act of assembly, which requires *a certificate of consent*, previous to the publication of a marriage, has no penalty annexed to it; and that the 2d section imposes the penalty of 50*l.* for joining in marriage, *without publication.*

It was agreed, that the defendant should pay the costs, and the plaintiff wave all further proceedings.

ISAAC MEASON v. SAMUEL PHILIPS.

BY articles of lease between them dated 30th *January*, 1793, *Meason* leased land to *Philips* for four years, at twelve shillings and sixpence *per acre*, which *Philips* covenanted to pay in good merchantable grain, wheat, at four shillings, rye, at three shillings, and corn, at two shillings and sixpence *per bushel.* And on this engagement *Meason* brought an action of covenant.

On the side of *Philips*, it was contended, that the damages should be ascertained by valuing the grain at the prices mentioned in the article. On the side of *Meason*, it was contended, that the damages should be ascertained by the current prices of the grain, at the time of delivery.

PRESIDENT. *Philips* has bound himself to deliver grain; and *Meason* to receive this grain at certain prices. Grain, not money, was the object in the view of both; and money was only used to ascertain the quantity of grain. The chance of gain or loss must be mutual.—If grain had fallen in value, *Philips* would have gained; for if he had tendered grain, *Meason* could not have required money. If money has fallen in value or, in other words, if grain has risen in value, *Meason* must gain; for a tender of money does not excuse from the covenant to deliver grain. The damages therefore ought to be

ascertained by valuing the grain at the current prices, at the time of delivery, with interest from that time.

1797.

The jury found accordingly; but not at the rate of the grain which had risen most. Probably they took the price of a part of each kind of grain.

NOTE.—Three other cases, one in the court of Common Pleas of *Washington* county, another in *Fayette* county, and the third in *Allegheny* county, have since been tried, and decided on the same principle, of giving, in damages, the increased value of the grain, with interest from the time of delivery,

WESTMORELAND COUNTY.

March Term, 1798.

THOMAS GRIER v. PATRICK COWAN.

THIS was an action of replevin for sundry articles taken in distress for rent. By the article of lease for three years, it appeared that the tenant was to pay no rent the first year, provided he put the dwelling-house in such order, as will make it convenient for his purpose, and that the rent for the other two years was to be 30*l.* *per annum*, in half yearly payments. The rent, for the two last years, was paid; and the distress was made for rent for the first year. Some evidence of repairs was given.

It was suggested, from the bench, that no definite rent *Co. Lit. 96.* for the first year being stipulated; but a kind of personal *1 Wils. 107.* obligation of repairs convenient for the lessee imposed, *2 Str. 1238.* and the value of the repairs either made or intended being uncertain; the landlord could not know for what amount to distrain, nor the tenant what sum to tender to relieve his goods.

The defendant's counsel gave up the right of distraining; but the plaintiff's counsel insisted on proceeding for damages, and got a verdict for 20 dollars.

FAYETTE COUNTY,

March Term, 1798.

Lessee of WILLIAM and JOHN LEE, v. PATRICK
TIERNAN.1798. **EJECTMENT** for four lots in the town of *Brownsville*.—

Simonson, for the plaintiff, shewed a receipt from *Thomas Brown*, the proprietor who laid out the town, dated 1st *October*, 1786, for 30*l.* paid by *Thomas Neily*, in full for four lots, (the lots in dispute) and engaging to make a title when requested.

On a judgment confessed by *Neily*, 28th *December*, 1787, for 790*l.* 13. 6. to *William* and *John Lee*; a writ of *feri facias* issued, tested 28th *September*, 1788, returnable to *December* term, 1788, for real debt 395*l.* 6*s.* 9*d.* with interest and costs. On this execution, these lots (with a tract of land) were levied and condemned; and, on 28th *July*, 1789, (on a writ of *venditioni exponas*, returnable to *September* term, 1789) the lots were sold to *William* and *John Lee*, for 12*l.* And, on 22d *September*, 1789, the sheriff acknowledged a deed to *William* and *John Lee* for the lots thus sold.

Brackenridge and *Campbell*, for the defendant, shewed a conveyance by *Brown* to *Matthew* and *William Vanlear*, of these four lots, dated 29th *June*, 1789, in consideration of 46*l.* and of sundry covenants therein mentioned; and a conveyance of the same lots from *Matthew* and *William Vanlear*, for 30*l.* to the defendant *Tiernan*, dated 28th *January*, 1792.

It was proved, that, in 1787, it was understood generally, that these lots were the property of *Neily*, and had been inclosed by him; but they were in the possession, or in the care, of one *Campbell*. *Tiernan* then lived in *Maryland*, and did not come into *Pennsylvania*, till in the spring of 1790; and there was no reason to believe, that he knew any thing of *Brown's* sale to *Neily*, or of the subsequent transactions. In 1789, *William Vanlear*, who was a creditor of *Neily's*, said he had an order from *Neily* on *Brown*, to convey these lots to him.

Brackenridge, for the defendant, rested on the want of notice to *Tiernan* of any claim to these lots, other than that which was conveyed to him; and on the principle, that a purchaser without notice will hold his title. 1798. *Fonbl. 151-3*

Simonson, for the plaintiff. *Brown* had no right to convey to *Vanlear*. He was a trustee for *Neily*; and, previously to the conveyance to *Vanlear*, the lots were levied for *William* and *John Lee*, and afterwards sold to them.

PRESIDENT. From the date of the receipt, *Brown* was a trustee for *Neily*, and every subsequent purchaser with notice, was, like *Brown*, a trustee. But, whenever the title to the lots came, by regular conveyance into the hands of a *bona fide* purchaser, without notice, for a valuable consideration, he must hold it, discharged of the trust.

Vanlear purchased with notice of the trust. He claimed under the trust. His right to this claim under the trust we have not seen. Whatever it was, by this claim, he seems to have got a conveyance from *Brown*. And this title to these lots he conveyed to *Tiernan*. But no notice of the trust has been brought home to *Tiernan*, a regular *bona fide* purchaser, for a valuable consideration, and (as no notice has been proved) without notice.

The levy and sale on a judgment not against *Brown* or *Vanlear*, but against *Neily*, could not be notice to *Tiernan*, who derived his title through *Vanlear* and *Brown* only. For, in the examination of the chain of title, it was not necessary, and could not be required, that *Tiernan* should examine any records against *Neily*.

Tiernan then, being a *bona fide* purchaser, without notice, and for a valuable consideration, and having a legal title; this legal title remains in him discharged of the trust. And there must, therefore, be a verdict for the defendant.

The jury found accordingly a verdict for the defendant.

WASHINGTON COUNTY.

April Term, 1798.

JOSEPH CREACRAFT and wife v. BENJAMIN WIONS.

1798.

CREACRAFT, having married the widow of *Jabez Baldwin*, sued for her dower of one third of 399 acres of land. A satisfaction and acceptance under the will was set up as a bar to this claim.

By his will, dated 10th *September*, 1778, *Jabez Baldwin* gave to his wife, now the wife of *Creacraft*, one third part of all his moveable estate, together with the use of one third of his lands, while she remained his widow, and also one cow over and above her thirds; and gave all the rest of his estate to his children.

Annexed to the will, and of the same date, was a note signed by his wife, stating that she voluntarily agreed to the above will. And, on 4th *March*, 1791, her then husband *Joseph Creacraft* gave a receipt, to *Caleb Baldwin*, one of the executors, for a cow over her third part, agreeably to the will of *Jabez Baldwin*.

It was proved, by the person who drew the will, that *J. Baldwin* and his wife talked together about the will, and that he drew it according to their directions; that he told *J. Baldwin*, that this was no more than the law would give her; that *J. Baldwin* then desired him to put in a cow besides the thirds; that she declared herself well satisfied, and, after his death, desired the executors to prove the will, and said, though she knew she could have her thirds, she did not want more than her husband had given her, nor to hurt the children; for her mother had done so and got a great estate, and ruined the children; and that, when the property was appraised, she chose and took a cow, as the one given her by will, and declared herself satisfied.

Jabez Baldwin left eight children, and a personal estate of 295l.

Campbell, for the plaintiffs. Whether the devise was intended to be in lieu of dower, must be ascertained from the will itself, and not from parole testimony. Dower is not barred by a collateral recompence, which will not be presumed to be in lieu of dower, but a benevolence.

Brackenridge, for the defendant. All the circumstances taken together shew a clear intention of the testator, that the devise should be in lieu of dower. It is not necessary, that this intention be expressed, if it be sufficiently implied. The devise has been accepted as a satisfaction, and is a complete bar to a claim of dower. 1798.

PRESIDENT. It is perhaps not so difficult to guess what the intention of the testator was, as to decide, that this intention is sufficiently expressed in the will, whence only it can be collected.

If this devise was intended in lieu of dower, the widow of *Jabez Baldwin* has been very little favoured by the will. All that she has got by the will, she would have got without it, except one cow; and, for that, her estate, which would have been during her life, is restrained to her widowhood, and determined by her marriage.

If a devise be given in lieu of dower, the widow may elect either, but cannot have both; and if she accept one, she is barred of the other. 4 Co. 1. Hargr. Co. Lit. 36. b. n. 6. 7. 1 Eq. Ca. Ab. 218-9.

But, unless it appear from the will, that the devise was in lieu of dower, the devise shall be considered as a benevolence; and the widow shall have both it and her dower. 1 Bro. Parl. Ca. 538. 1 Bro. Parl. Ca. 591.—2

But it is not necessary, that it should appear from express words of the will, that the devise is in lieu of dower; it is enough, that this intention be implied, and seem necessary to give effect to the will. Atk. 427.—3 Atk. 8, 436. 2 Wms. 616. 7.—1 Vern. 356.—2 Vern. 365.—Dall. 415.

If the legacy and devise be *instead* of dower, the widow is barred by her acceptance; but if *together with* dower, she is not barred. Ambler. 464. 682, 730.

There is no express declaration in this will, that the devise and legacy should be in lieu of dower; and, unless this intention be implied, the plaintiffs must recover.

The only ground for such an implication in the will seems to be this, that, except the legacy and devise, *all the rest of his estate* is given to his children, and so nothing is left for dower,

The jury found a verdict for the defendant.

NOTE.—There were three suits against three tenants. One had been tried before; there was a verdict for the defendant, and a motion for a new trial, postponed for the trial of this. It was recommended to remove the third

1798. into the Supreme court. This was done; and, in the mean time, no judgment was given, on either of the verdicts.
- 4 St. L. 155. The act of assembly, of 4th April, 1797, has settled it, in future, that a devise shall be in lieu of dower, unless otherwise declared.

ALLEGHENY COUNTY,

June Term, 1798.

PENNSYLVANIA v. JOHN LEACH, WILLIAM LEACH,
THOMAS LEACH, and WILLIAM M'LURGH.

THIS was an indictment for a forcible Entry, on 28th February last, on a tract of land in possession of *George Konkle*

Konkle had bought an old improvement, where there were trees deadened, and potatoes planted. He built a cabbin partly of logs lying cut, and partly of logs cut by him at that time. The *Leaches* had deadened some trees, and cleared some ground on this land. They threw down *Konkle's* cabbin, and built another with the logs of it in another place. *M'Lurgh* assisted them in building this other cabbin. Neither *Konkle* nor *Leach* lived then on the land. *Konkle* lived with his family on another tract of land, which he had bought, two or three miles from this; he was himself generally in this cabbin with some of his goods; and the evening before the *Leaches* pulled down his cabbin, he had gone home, to sell meat to one who wanted it from him; but went unwillingly, for fear that the *Leaches* should go into his cabbin, while he was absent. When he returned next day, he found them pulling down his cabbin. *J. Leach*, with a gun in his hand, told *Konkle*, he must not work more there. While he was taking away some of his clapboards, to make a temporary shelter for his family, *J. Leach* came up to him, and shook him by the breast. One said, "strike him;" *T. Leach* said, "Don't strike

him;" *McClurg* said nothing. *W. Leach* threw him against a log. Afterwards he went back, when the *Leaches* were not there, built another cabbin close to the door of that which the *Leaches* had built of the logs of his first, brought his family there, and lived in it. While he was making a fence, *J. Leach* threw him down, and threw down his fence, on which his wife was sitting. He desisted. The *Leaches* took the rails which he had made, fenced and cultivated ground, which he had begun to clear, before he brought his family there. He went and cleared in another place. Both he and they occupy cleared ground on this tract, and have grain growing on it.

1798.

Collins and *Campbell*, for the defendants, proposed, that *McClurg*, as they said no proof of force by him had been given, should be examined as a witness. *Gill. L. of Ev. 134.*

Woods, for the prosecutor. All who accompany the person using the force are guilty. It has been proved, that *McClurg* was present and assisting to build, into a cabbin for *Leach*, the logs which had been thrown down from the cabbin of *Konkle*. Whether there be such a possession, as will be protected against a forcible entry is a question of fact. If there be any testimony, though not enough to convict, in the judge's opinion, such person can be no witness: for his guilt or innocence must wait the event of a verdict; and a jury, of their own knowledge may have farther light in the fact, than what they hear from the witnesses in court. *Gill. L. of Ev. 134 5.*

PRESIDENT. Whether, if there be evidence of possession, that evidence be true, is a question of fact to be determined by the jury. But admitting the testimony as true, whether there be such possession proved as will be protected against a forcible entry, is a question of law to be determined by the court. I lay no stress on any knowledge which the jury may have, not drawn from evidence given before the court. This would destroy all principles, and render it impossible for courts to give new trials. If any juror has knowledge of facts not given in evidence, he ought to declare it, and be sworn as a witness. If circumstances be proved, from which it is possible for the jury to presume facts amounting to guilt, the person against whom those cir-

1798.

cumstances have been proved cannot be received as a witness.

The cabbin built by *Konkle* does not seem to have been his *home*. His *home*, his house and his family were two miles from this place. But while he was in it, or on the land, it was a temporary home, and, as such, while so occupied, it is protected against force. Proof of force, and of an entry by force has been made. And, if this force was exerted, while he was in the house, or on the land, there is an offence. The guilt or innocence, therefore, turns on this question; was *Konkle* in the house, or on the land, when *Leach* made this entry? This is a question of fact, and, however improbable, we are not the judges of its probability or improbability; since there are circumstances from which the jury may presume it. Therefore, though, the prosecutor being a competent witness, we might lean to the admission of this defendant, as a mean of producing an elucidation of the facts; we do not feel ourselves at liberty to admit *McClurgh* to give evidence on this trial.

Collins then offered in evidence a warrant for this land, and a survey of it made on this warrant.

Woods. No right will authorise an entry by force, on the possession of another. If there was no possession in another, there is no offence.

Collins. I offer the warrant and survey, to shew that *Leach* had a right, under the act of assembly, to make an entry in order to make a settlement.

PRESIDENT. The warrant and survey gave a right to enter, and make the settlement. But the entry must be peaceable. If a previous possession be taken, and will not be abandoned from the influence of persuasion, force must not be used. The person having the right by warrant to enter, if prevented from making his settlement, by the possession of another, whom he cannot remove without committing an offence, cannot, from such failure, be supposed to lose his right.

This would seem to me to be the true doctrine, on general principles. Whether the peculiar nature of the act of assembly, under which these settlements are made, ought to distinguish cases under it from other cases, may perhaps be made a subject of discussion. It may perhaps be contended, that one who has a warrant, and has done

or caused to be done, some work on the land claimed by this warrant; if, while the person employed in making such settlement, is occasionally absent, another comes on the land; may turn this other off by force. On this I say nothing. 1798.

But may not one having made a survey on a warrant, give in evidence this survey, not as establishing a right, but as circumscribing the bounds of his possession?

It was then admitted, that *Leach* had a warrant and survey, and that *Konkle* was within this survey.

It was proved, for the defendants, that in spring 1797 (the two cabins were then built) *Konkle* being asked who cleared a certain field, said, *John Leach* had cleared it; and that he said, he had once given up that land.

Collins and Campbell. *Konkle* was not in possession, when the *Leaches* entered and built their cabin with the logs of his. *Konkle* abandoned his possession; and *Leach* was working on this land, when *Konkle* returned.—*Leach* has a survey; *Konkle* has none. *Leach* has not ousted *Konkle* of any land of which he was possessed. He yet occupies his house and his fields. As to any land now in the possession of *Leach*, you have no evidence of its having been in the possession of *Konkle*, but from his own testimony; and he is a competent witness only as to the force.

Woods. It is not necessary, in order to make a forcible entry an offence, that there should be any person residing on the land. Breaking open a dwelling-house, ^{2 Hawk. 220.} whether any person be in it or not, is indictable as a forcible entry.

PRESIDENT. I think that must be understood of a dwelling-house on premises of which some person is in possession. Having only cattle on the land has been considered as not being in possession. And the reason assigned is, because they are not like servants capable of being substituted as agents, and therefore their residing upon the land continues no possession. ^{2 Burns, J. 179.—2 Bas. Abr. 558.}

The jury found the defendants guilty.

WASHINGTON COUNTY,

August Term, 1798.

Lessee of DANIEL DIMOND v. DAVID ENOCH.

1798.

EJECTMENT for 230 acres of land, of July term, 1797.

On 3d *October*, 1786, *James Fitzpatrick* conveyed in fee simple an improvement and 230 acres of land (the premises in question) to *David Enoch*; who gave a bond, of the same date, to *Fitzpatrick*, in 252l. 8s. conditioned, that, if *Fitzpatrick* pay or tender 126l. 4s. on or before 1st *March* then next ensuing, *Enoch* will reconvey the tract of land that day conveyed. On 1st *June*, 1788, this bond was assigned to *Daniel Dimond*, who had bought the land from *Fitzpatrick* for 200l. as appeared by an article of the sale, dated 29th *December*, 1786, by which he bound himself to pay 126l. on the 1st *March* then next ensuing. About the year 1789 or 1790, *Dimond* went to *Enoch*, and proposed to take or give satisfaction. *Enoch* declined both. In spring, 1797, *Dimond* tendered upwards of 530 dollars to *Enoch*, who refused to receive it.

Fitzpatrick had bought the land from one *Bozier*; and a bond of *Fitzpatrick* to *Bozier*, for the payment of 126l. 4s. with interest due on it, part or all (it did not appear which) of the consideration money, had been transferred to *Enoch*. *Fitzpatrick*, not being able to pay the money, executed the conveyance, dated 3d *October*, 1786, to *Enoch*, and took from him the bond of that date. As good or better land, in that part of the country, has been sold since, at twelve shillings and sixpence per acre. *Enoch* was not to take possession of the land, till after default of payment by *Fitzpatrick*, on 1st *March*, 1787. A few days after that, he had the land surveyed on a warrant which he purchased for it. *Fitzpatrick* was present and made no opposition, and did not say, that he had transferred his interest in the land. *Enoch* has continued in possession, and made improvements.

There was no evidence of any specific conversation or agreement, between *Enoch* and *Fitzpatrick*, at the time the conveyance was made in *October*, 1786. One witness said, he understood it as a mortgage; another said, he understood, that, if *Fitzpatrick* paid the money, at the time mentioned in the bond, the land was to be reconveyed to him. But, if he did not, that *Enoch* would hold it by the conveyance.

1798.

Simonson, for the defendant, offered to shew a warrant for the land, in the name of another person, at the time that the conveyance and bond were executed in *October*, 1786; and, urging that a defendant may claim under any title, stated, that, here, there was an adverse title, at the time, and that *Fitzpatrick* imposed on *Enoch*, and gave him a security, to which he had no right.

Campbell objected to this, that the defendant having come into possession under a deed which he accepted from the plaintiff; cannot now dispute the plaintiff's title. In an ejectment on a sheriff's sale, the debtor cannot set up a title from another person. It was so determined at *Nisi Prius*, in *Allegheny* county, last *May*, in the case of *Baldwin v. Bently*.

PRESIDENT. If a man take a lease from another, can he set up an adverse title, to bar an ejectment, or a claim for rent, by the lessor? We reject the testimony; but, if insisted on, the point may be reserved, though I see no difficulty in it.

Simonson. A covenant for the benefit of the covenantor, must be strictly complied with. All covenants must be taken according to the intent of the parties.

Lyon, for the plaintiff. This is a mortgage. And, the money, with interest, having been tendered, the title of the mortgage is extinguished.

PRESIDENT. A conveyance may be considered as a mortgage, though the defeazance be on a separate paper. We have not sufficient evidence, on which to found an opinion how this transaction ought to be considered.

But I do not think, that we ought to strain hard, to construe a transaction of this kind as a mortgage. If, without violating any rule of law, we can consider it as the parties intended, we ought to do so. It may be considered as a conveyance on a certain condition, the default

1798.

of payment on the day. Each party may have wished to avoid the costs and trouble of a suit on a mortgage. *Fitzpatrick* may be supposed to say, "Give me five months to pay the money without interest, and, if I do not, the land shall be yours;" and *Enoch* to say 'I agree.'

Suppose it a mortgage with possession; cases might exist, in which a tender of only the debt and interest ought not to extinguish the estate. A man going into possession under a contract is not as a trespasser. May he not have a claim for necessary or proper repairs or improvements? Or must he abstain from them, on the mere possibility of the other performing the condition? — Was *Enoch* to have nothing for his warrant and survey?

I lay not much stress on the conversation (for it seems to be nothing more) between *Dimond* and *Enoch* in the year 1789 or 1790. No specific proposition appears to have been made; but only a trial whether *Enoch* was willing to depart from his contract with *Fitzpatrick*, and allow *Dimond* something for his speculation. No tender was made till 1797, ten years after the condition ought to have been performed. This seems to be unreasonable negligence. While it was doubtful whether the land was worth more than the money, *Dimond* seems to have been very inactive or indifferent. When an extraordinary rise in the value of land happened; he presses for the land.

If the plaintiff's counsel think this *must* be construed as a mortgage, they may move for a new trial. For I have said that it *may* be construed otherwise,

Verdict for the defendant,

ALLEGHENY COUNTY.

September Term, 1798.

Lessee of WILLIAM CECIL v. JAMES AMBERSON.

EJECTMENT for 400 acres of land west of the *Allegheny* river. 1798.

Cecil and *Amberson* claimed by settlement, under the law of 1792. Each had a cabin built at the distance of three or four hundred yards from each other. Both applied to the surveyor of the district to survey for them in spring, 1794. While the surveyor was executing the survey, and came to where *Cecil* thought he was going on the disputed land, *Cecil* told *Amberson*, he was incroaching on him; *Amberson* said, he could take his cabin, and a piece of bottom below it. *Cecil* said he was intitled to a survey, and requested the surveyor to interfere, and get *Amberson* to leave him a piece of land, and not take in his cabin. *Amberson* agreed to make a line, and both agreed on a course. *Cecil* carried the chain, and, after proceeding some distance on the course, threw it down, and said, he would not agree to it, for it went too near his house. The surveyor said they had agreed on the course, and he would not alter it. The surveyor then surveyed *Cecil's* tract. *Amberson* had 308 acres.—*Cecil* not 240. The division line was within about 30 perches of *Cecil's* house.

Brackenridge, for the plaintiff, offered a private survey made by *Cecil* in 1797.

Semple, for the defendant, objected to this.

PRESIDENT. A survey having been made by the public officer, at the request, and in the presence of both parties; a subsequent private survey cannot be received. The plaintiff ought to have applied for a *re-survey*.

ALLEGHENY COUNTY,

December Term, 1798.

JOSEPH MARSHAL v. JAMES SPROTT.

1798.

THIS was an action of *indebitatus assumpsit*, for money had and received.

3 St. L. 209.

When the law of 3d April, 1792, opened the Land-Office for the disposition of land west of the *Allegheny* river, many supposed, that each person had a right to appropriate to himself, by settlement only, as well as by warrant, as many tracts of land as he could procure to be settled. This principle, taken as certain, was immoderately abused. And a great number of tracts were so claimed by each of many individuals, by means of trifling cabbins, deadenings, &c. which they called *improvements*; but which had no kind of resemblance to what the law intended, "an actual personal resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family."

2 St. L. 488.

Of these the defendant seems to have been one, and, by such improvements, claimed several tracts, which he proposed to sell to settlers. Two hundred acres, the half of one of his tracts so claimed, he sold to the plaintiff, for 200 dollars, by an article dated 24th February, 1797, binding the plaintiff to clear ten acres, and reside on the land five years. This settlement and residence would have intitled the settler, and, as *Sprott* conceived, would have intitled him, under the law, on the payment of the purchase money, to a patent for 400 acres.

In April, 1797, *Marshal*, going to settle on this land, found one *Lowry*, with his family, residing there; who, having raised a crop of corn there, the year before, claimed a tract of 400 acres. There were other settlers round, and there was no reason to believe, that *Lowry* could have more land to his settlement, out of their boundaries, than 400 acres. In February, 1797, one *Willis* had applied to *Sprott* for the land. *Sprott* told him, he had promised it to *Marshal*, the fall before, and

if he stood to his bargain, he would not give it to another. They went to *Marshal*, and he stood to his bargain, and paid *Sprott* part of the money. There was no evidence, that *Marshal* knew any adverse possession.

1798.

Brackenridge, for the defendant, offered to prove a parole contract previous to the article.

PRESIDENT. The parties have reduced all their previous negotiation to the points stated in the article.— There is no suggestion of fraud.

Brackenridge then called a brother of the defendant, to prove, that, at the time of the payment of the money, *Sprott* offered to *Marshal*, to give up the bargain, and demand no money, if he relinquished his claim to the land.

Simple, for the plaintiff, objected to this testimony, and stated, that *Sprott* had brought an action against *Marshal* on the article.

PRESIDENT. If an action be brought on the covenant, *Sprott* can recover damages for any default of *Marshal*. *Marshal*, having no knowledge of any adverse possession, went to make a settlement according to his article. He found another in possession, and could not proceed to make his settlement, without taking possession by force, (which would have been an offence) or prosecuting an ejectment. He was not obliged to do this; but, in such a case, had a right to say, that the bargain, from this material defect, an adverse possession, became void, and he had a right to demand back his money. The defendant seems to have been conscious of this, and proposed to do precisely the same thing. I can see no use in the evidence offered. But, if the defendant's counsel think otherwise, we will reserve the point.

There was a verdict for the plaintiff.

WESTMORELAND COUNTY.

December Term, 1798.

Lessee of the Executors of THEODORUS BROWERS,
v. FRANCISCUS FROMM.

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BROWERS was a *German* catholic priest, who after a residence in a *Danish West-India* island, had, a few years before his death removed into *Pennsylvania*, and superintended a catholic congregation near *Greensburgh* in *Westmoreland* county, and owned two plantations there; which, by his will, dated 24th *October*, 1790, he devised as follows:—"To a Roman Catholic priest that shall succeed me in this said place, to be entailed to him, and his successors, in trust, and so left by him who shall succeed me to his successors, and so in trust and for the use herein mentioned in succession forever. And that the said priest for the time being shall strictly and faithfully say four masses, each and every year forever, viz. one for the soul of the Reverend *Theodorus Browsers*, on the day of his death, in each and every year forever, and three others, the following days in each year as aforesaid, at the request of the Reverend *Theodorus Browsers*. And further it is my will, that the priest for the time being shall transmit the land so left him in trust as aforesaid to his successor, clear of all incumbrances, as aforesaid."

The will directed the payment of debts and funeral expences, and the erection of a tombstone on the grave of the testator on the premises. The ejectment was brought for the land thus devised.

The defendant, a native of *Germany*, was there ordained a Catholic priest, in 1773, and officiated, in that capacity, in various parts of *Germany*. In *February*, 1789, intending to remove to *America*, he obtained from the vicar of the archbishop of *Mentz*, a commendatory certificate of mission to *America*, as to a country in which there was no bishop. The Reverend Dr. *John Carroll* of *Maryland*, having been elected by the Roman Catholic clergy of *America*, was, by a bull of the present *Pope*

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Pius VI. dated 6th November, 1789, constituted bishop of *Baltimore*, with jurisdiction over all the Catholic church within the *United States*, to be suffragan to no metropolitan, and subject only to the Apostolic See.— After *Fromm* had landed in *America*, he applied to bishop *Carrol*, received pecuniary assistance from him, and was employed to officiate as a priest for some time, in the counties of *York* and *Lancaster* in *Pennsylvania*. Hearing of the devise and death of *Browsers*, he removed to *Westmoreland* county, and, of his own authority, took possession of his house and the lands; and, 2d July, 1791, drew up and signed a writing reciting the manner of his taking possession, as under the will, and procured the executors to sign a certificate of their assent annexed to this writing. On the 7th of August, 1791, he wrote to bishop *Carrol* stating, that, as he understood, he had not received him among his clergy, but abandoned him, he had gone near to *Greensburgh*, and taken possession of the plantation of *Browsers*, and been chosen by his congregation, where he would stay till he could acquire money to pay his debts, and his passage to his own country, and requesting the bishop's consent to his election as priest of *Browsers's* congregation.

After *Fromm* had thus got possession of the estate of *Browsers*, the congregation began to doubt his authority, and wanted to turn him off. In April, 1794, he entered into a written agreement with the congregation, to officiate as priest among them, for one year, in consideration of certain sums to be paid by the individual members of the congregation; and to obtain authority from the bishop of *Baltimore*, for this purpose; or, if the bishop should refuse authority, then to give up his possession of the estate. This agreement he signed, adding to his name "*Priest of Unity congregation for one year.*" Not procuring authority from the bishop, he determined to keep possession of the estate under the will, on the terms of saying masses. But conceiving that his agreement would injure his claim, he contrived to get hold of it, under pretence of collecting his subscription money, and, having done this, he pocketed the agreement, as it lay on the table, where the subscribers were paying him his money; and, when they remonstrated against this, he tore his name from it, saying, "I am no more

1798. your priest, nor you my congregation;" refused to give it up; and persisted in retaining possession of the estate.

A certificate of the bishop of *Baltimore*, dated 5th *August*, 1795, was produced, stating, that by the rules of the Catholic church, no priest can exercise his ministry within the jurisdiction of any bishop, without authority from that bishop; nor leave his congregation, and exercise his ministry in another, without such authority; that *Fromm* never had any authority from him to exercise any spiritual ministry near the place of his residence, and, having exercised it, was interdicted, and, persisting, is suspended.

A certificate was also produced from the vicar general of the archbishop of *Mentz*, under the seal of his archi-episcopal see, dated 8th *May*, 1797, stating, that *Fromm* is a priest capable of succeeding to the estate of *Browers*; that priests may obtain mission, from any bishop, to administer the sacraments, and enjoy all rights of priests, in those places where there is no bishop; that bulls must be promulgated in due manner; that the sacrament of the mass may be validly celebrated by any priest, whether a parish priest or not, although this be interdicted to the priest, by the bishop, and though, by its celebration, the priest acts illegally; and that, if masses of this kind be founded, by such celebration, the foundation and obligation may be validly satisfied.

Brackenridge, for the defendant, made eight points.

1. The executors had no authority to lease, or make any such agreement, as they made with *Fromm*, in *April*, 1794. If they had any authority, it was to put in possession for life; and having done so, in *July*, 1791, their power expired; and, after that, the priest so put in possession, is, by the will, to leave it to his successor.

2. Executors have *no* authority over the real estate, unless given by the will. This will gives none.

3. If they had any authority, they have executed it.

4. By the rules of the Catholic church, bulls must be promulgated in certain forms. The bull constituting the bishop of *Baltimore* has not been in due form promulgated.

5. The authority of the bishop extends only to the person. He has no authority over a private estate.—
2 Schram. Infl. Jur, Ec. 153. There is a difference between a benefice connected with

Corp. Jur.

Can. Extrav.

Com. L. 1. tit.

3. c. un. Benif.

the care of souls, and a benefice connected with a special service. The antient *British* church was a stranger to papal authority; and laws were made to restrain appeals to it. Even where there is a right, it may be left without a remedy by the claimant's negligence permitting a lapse of time. The canon law fortifies a colourable possession, the enjoyment of which has been permitted for a certain time, for one year, or for three years.

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4 Comm. 103.

3 Comm. 242.

Fleur. Inst.

Jur. Ec. 347.

Schram. 252.

6. The censure of the bishop of *Baltimore* is not regular. It is invalid for informality. There ought to have been three admonitions previous to it, in the presence of witnesses; unless the censure be by law, which is public to all.

Besom. Mor.

Christ. 96.

3 Schram. Inst.

292.

7. Notwithstanding a suspension, or even excommunication, a priest remains a priest. He may administer the sacrament of the mass, though under a mortal sin. He may confess and absolve. A priest though he do not preach is not less a priest. A priest cannot become a layman. The laying on of hands gives the holy spirit, which cannot be taken away. To suppose otherwise would be inconsistent with the presumption on which the ordination is founded, that he is in a state of grace. The perseverance of saints is an established doctrine of the Calvinist church. The elect cannot fall away. The spirit of God cannot be taken away by the censure of the church. A priest who holds an estate, on condition of saying mass, is not affected by any interdict or censure of the church.

Can. Cons.

Trid. 62. 102.

195.

Conf. of Faith

101. Larg.

Catech. 235.

8. This estate was vacant, and acquirable by the first occupant, qualified for performing the condition. It was not to be given by the executors, or by the bishop. Any Catholic priest, who should first set his foot on it might take it, hold it, and transmit it to his successor. Occupancy is a title known to the law, the taking possession of things belonging to nobody. This estate was of that description.

2 Comm. 258.

Young, for the plaintiff. All sects of religion are protected by our laws; and, if an intruder be indulged in possession of property belonging to the Roman Catholic church, the same thing will happen in every church.— This case must be decided with a due regard to the rules of the church of which the defendant is a member. If this man controvert the rules of the church of which he

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professes to be a member, he is not a pastor; to use with due respect the language of holy writ, "he cometh not in by the door, but climbeth in at a window, and is not the true shepherd, but a thief and a robber."

1. The defendant's counsel has contended, that his priesthood is so sacred, that he cannot be divested of it.

I shall not dispute whether the defendant be in a state of grace, or not. All I will say is, that, if he be, he has, by contradicting the solemn obligations which he has taken upon him, not shewn any marks of grace.

No human authority can take from him his skill in divinity, sacred history, and spiritual gifts. But because he possesses them, has he a right to exercise them, wherever he pleases. I shall suppose a compleat scholar, bred at the university of *Oxford*, instructed as a lawyer at the inns of court, and in *Westminster Hall* advanced to the degree of sergeant or king's counsel, arrives here; is he intitled, without any other formality, to appear at the bar of any court in this country? Let Dr. *Fromm*, with all his gifts of learning and grace, retire to his own country, and there exercise them, where the exercise of them was first permitted.

Apost. Can. 12.

The rules of his church declare, that, if any priest leave his parish, and continue in another without his bishop's consent, he must no longer perform his liturgy; and, if, when his bishop calls him back, he persist in his irregularity, let him communicate as a layman. If any man will have ecclesiastical offices performed without a priest constituted by the consent of the bishop, let him be anathema.

Con. 6.

Fromm acknowledged the authority of bishop *Carrol*, and accepted an appointment from him. Then he was a wretched beggar, having squandered his money, unable to pay his passage from *Germany*, and was nourished by the liberality of the bishop. Now, having obtained what he thinks an estate, secured to him for life, he sets the bishop and the world at defiance. He has violated his sacred obligation of subjection to his superior, the bishop of *Baltimore*; and, for this contumacious offence has been interdicted and suspended, and is no longer a priest qualified for the regular exercise of spiritual functions.

2. This is said to be a foundation for saying masses yearly, for the soul of Mr. *Browsers*. This is too absurd

to be supposed in a man of such learning and sense; as Mr. *Browsers* possessed. *Browsers* gave this estate to enable a poor Catholic congregation to support a priest regularly admitted to administer instruction and the sacraments to a flock which he loved. He gave it to his *successor* duly appointed according to the rules of his church. Successor will be construed as a priest regularly inducted into the care of the souls of this congregation, over which Mr. *Browsers* exercised pastoral functions. Suppose Mr. *Browsers* alive, and to present to this cure on his foundation, he could not, without the consent of the bishop; for the bishop may reject an unqualified presentee of the patron.

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Can. Cont.
Trid. 229.
103.

The true point in this case is, whether the executors have a right to eject this intruder. I conceive they have a right to keep possession, till the ecclesiastical superior induct a proper tenant under the will. The will directs, that his debts and funeral expences should be paid. It says not out of what fund. The personal estate has been dilapidated by such another reprobate as the defendant. The real estate, then, must be a fund for payment of debts. All authorities of this kind will be liberally construed. A man who leaves this world without making provision for the payment of his debts must remain in purgatory. The executors had no right to present an incumbent; but they had a right to take care of the estate, till an incumbent came. They could expend money in improvement of the estate, erecting a tomb, &c. Hence results an authority over it as special occupants, to fulfil the intention of the testator. This objection, like that to the jurisdiction of the bishop of *Baltimore*, lies not in the mouth of *Fromm*, who has admitted the authority of the executors, by applying for their sanction annexed to his solemn instrument of taking possession. *Fromm* turns, as he states, to the east, west, north, and south; and does not, like each of the two antient patriarchs, content himself with two of the quarters, but takes all. And now he contends, that, possession having been acquired by him, with the consent of the executors, their power is exhausted. The whole transaction of his occupancy is fraudulent, and the law will give no efficacy to it. He imposed himself on the executors and the congregation as a priest appointed by the bishop to

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officiate in that congregation. And, when suspected and detected, he agrees to give up his possession at the will of the bishop. He goes not to the bishop for authority, remains in possession, and, at the end of the year, the cunning old priest fraudulently obtains and destroys the only paper, as he thought, which could destroy his new claim to the perpetual enjoyment of this estate, by virtue of his inherent spiritual power of saying masses; and sets at nought the sacred duty, which Mr. *Browers* must chiefly have had in view, the care of the souls of this congregation. And, to confirm his estate, he resorts to triennial possession. But this is where there is a colourable title. However, we have nothing to do with the canon law, as to the possession of an estate.

Hargr. Co.
Lit. 42. a. b.
283. b.

The law, which abhors wrong, will not work a wrong. The law regards a less estate by right, rather than a larger by wrong. Where the grant cannot take effect according to the letter, the law will make such construction, as that the gift may take effect. In debt

Bull: Ni. Pri.
170, 177.

for rent, the tenant cannot plead *nil habuit in tenementis*; for the indenture concludes both. An estate was left by will to *B.* his heirs, executors, and administrators,

2 Eq. Ca. Abr.
193.

in trust, for the use of dissenting ministers, in places where the people are unable to allow them suitable maintenance. The trustee died before the testator. It was held, by the lord chancellor, that the trustee was but an instrument, to convey the legacy to those for whose use it was intended, and that, notwithstanding his death, the charity itself, which was the substance and reason of the devise, is still subsisting, and may be answered as fully, by the aid and directions of the court of Chancery, as if the legatee were alive. Whatever rules would be adopted in favour of protestant dissenters in *England*, will be applied to Catholics here.

Brackenridge, for the defendant. Mr. *Fromm* came into *America* a priest of unquestionable character. He having acknowledged the jurisdiction of bishop *Carrol*, by accepting an appointment from him, I wave the question of the publication of the bull, I wave also the necessity of monitions, and admit that *Fromm* has been legally suspended.

I rest on the distinction between an estate to which cure of souls is annexed, and one depending on particu-

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lar functions. A priest once is a priest always. Grace given can never be lost. Here is an estate given on condition of saying masses. No censure can deprive a priest of this power. If a man has acquired an estate, and disposed of it, as he thought proper, will you apply it to another purpose? The executors are not to have it and keep it. A priest is to get it, and transmit it to a priest, and so forever: and the possessor is to perform the service of saying four masses yearly for the soul of Mr. *Browsers*. On the death of *Browsers*, this estate was vacant, to be taken possession of by any priest, as a special occupant. *Fromm* took possession in a solemn manner, under the will, without any consent of the executors. This made *Fromm's* title for life complete, and the subsequent transaction, of the article for one year, is either misrepresented, or cannot be supposed to divest him of his interest. The executors had either no power, or none to lease for a year. Whenever they gave possession, they were *functi officio*. This is a private estate to which no cure of souls is annexed.

Semple, for the plaintiff. *Browsers* left this estate for the benefit of his poor congregation incapable themselves of supporting a priest. *Fromm* comes forward pretending himself qualified. This is a fraud and vitiates the contract with the executors. *Fromm's* letter to bishop *Carrol* acknowledges his jurisdiction, and prays his consent to admission to this congregation. *Fromm* can only acquire title to this estate with the consent of the bishop of *Baltimore*, whose jurisdiction he cannot controvert.

Suppose the ghost of *Browsers* hovering over us now, would he not blush for the conduct of his unworthy successor?

Suspension incapacitates from discharging the duties prescribed by the will.

PRESIDENT. This case has been argued with ingenuity, and with good sense. Much canonical learning has been expended, the discussion of which I do not think necessary, in deciding this case on its merits.

It is to be regretted, that people will apply to ignorant men to write wills and other papers affecting property. Had this will been written by a man of any skill,

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competent to express the meaning of the testator, all this dispute might have been avoided. The testator himself had but little acquaintance either with our laws or our language. As the will stands, the meaning of the testator seems to be discoverable; and, if it be, we ought, if consistently with established rules, it be in our power, to carry it into effect.

Theodorus Browers, a priest regularly exercising pastoral functions in a congregation, was desirous of extending to this congregation his good will and services beyond his life. With this view, he made his will and devised this estate to the priest who should *succeed* him, and to his *successors* forever. And on this succeeding priest, and every succeeding priest for the time being, he imposed the duty of saying masses. As I view this will, therefore, no man could be legally admitted to the possession of this estate under the will, but one qualified to succeed Mr. *Browers* in the discharge of the pastoral duties in this congregation, according to the rules of the Roman Catholic church. When one so qualified to succeed Mr. *Browers*, in his pastoral charge, is admitted into the possession of this estate, he must, to retain this possession, continue to discharge the pastoral functions in this congregation according to the rules of this church; and, besides those pastoral duties, he must say four masses yearly for the soul of Mr. *Browers*.

I lay out of the question all discussion, whether a priest can, by any sentence of the church, be reduced to the state of a layman, and disqualified from saying masses, or dispensing any of the sacraments. It will be sufficient for me to ascertain whether *Fromm*, according to the rules of the Catholic church, was qualified to take, and is qualified to retain, possession of this estate, under the will as I have construed it.

On the construction, which I give the will, he was not qualified to take possession of this estate; for he was not regularly admitted to exercise the pastoral functions in this congregation; and this estate was devised for the use of a priest regularly admitted to the discharge of those duties, who should also, besides those duties discharge the other duties of masses for the soul of Mr. *Browers*. His disqualification has not been removed, but confirmed by the interdict and suspension.

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Had this been an independent congregation acknowledging no superior authority or appellate jurisdiction over their internal concerns, his priest's office, and the assent of the congregation might have been a sufficient introduction of him into the enjoyment of this estate. But, in other Christian churches, there are grades of jurisdiction, general and national councils, general assemblies, synods, and presbyteries; pope, patriarch, metropolitan, suffragan, arch-bishop, and bishop. As, in churches of the presbyterian form, no minister can be regularly qualified to discharge the pastoral functions in any congregation or parish without the appointment of the presbytery of the bounds; so, in churches of the episcopal form, without the appointment of the bishop of the diocese.

The bishop of *Baltimore* has, and before, and at the time of *Fromm's* taking possession of this estate, had the sole episcopal authority over the Catholic church of the *United States*. Every Catholic congregation within the *United States* is subject to his inspection; and, without authority from him, no Catholic priest can exercise any pastoral functions over any congregation within the *United States*. Without his appointment or permission to exercise pastoral functions over this congregation, no priest can be intitled, under the will of *Browsers*, to claim the enjoyment of this estate. *Fromm* has no such appointment or permission, and is, therefore, incompetent to discharge the duties, or enjoy the benefits, which are the objects of the will of *Browsers*.

We cannot suppose, that Mr. *Browsers* intended, that his estate should be enjoyed by any vagrant irregular priest, who might happen first to occupy it. He surely meant a priest regularly established as pastor of this congregation. I feel it a duty to strain every expression against the construction, that this is a foundation of masses for the soul of the dead, without any care of the souls of the living. And I find expressions in this will, sufficient to satisfy me, that *Browsers* devised his estate to his successors in the pastoral duties over that congregation.

With this opinion, it is not to be supposed that I should consider the possession of Mr. *Fromm*, acquired

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as it was, otherwise than as the possession of an intruder without any right. He himself seems in an honest moment, to have considered it in the same light, and solemnly agreed to give it up, if the bishop did not consent to his establishment as priest in that congregation.

I have no hesitation in saying, that the defendant has no right.

The next question is, whether the executors are the proper persons to make a lease on which to support an ejectment.

We have no court of Chancery in *Pennsylvania*, to superintend the execution of trusts. Perhaps it would have been proper to apply to the legislature, to vest the estate in trustees for the uses of the will of *Theodorus Browers*. As the case stands, no persons are more proper, as lessors, than the executors. They have a right to possession for some purposes, to build a tomb, &c. I have no inclination to look, with an eagle's eye, into every defect in point of form, when I am so clear, that the defendant has no right to possession. At any rate, I am not now prepared to say, that, on this ground, there ought to be a verdict for the defendant. If the executors be incompetent to make a lease, on which to support an ejectment, the defendant may obtain the deliberate opinion of this or a superior court. Now, I think, there ought to be a verdict for the plaintiff.

The jury found a verdict for the plaintiff.

FAYETTE COUNTY,

December Term, 1798.

JOHN WORK v. ROBERT GRIER.

CASE, on a contract, made 11th *February*, 1797, of sale of a plantation and mill, for falsely, fraudulently, and deceitfully affirming, that the mill-dam was sound, sufficient, and founded on a rock; trusting to which the plaintiff purchased the plantation and mill for 1500*l.* whereas the mill-dam was then unsound, insufficient, not founded on a rock, and great part of it without foundation.

Of the price 600*l.* was paid at the time of the contract, and bonds given for the rest, in yearly payments. There was no article of the sale. But on the bond last due, payable in the year 1800, the following writing was indorsed, signed and sealed by the parties.

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“ P. S.—This obligation is subject to the following stipulation, viz. that, if the mill-dam, for the payment of which this bond is a part, should happen to break, by reason of a bad foundation only, a deduction of the sum of one hundred pounds is agreed upon in lieu thereof, in favour of said *Work*. It is also agreed, that the said *Work* is to use all lawful endeavours and costs, in order to prevent any breach about said dam, by keeping it sufficiently dirtied, and free from such symptoms as might occasion the same.”

A witness was called to prove the representation, at the time of the contract.

Campbell and *Pentecost*, for the defendant, objected to parole testimony, as the parties had reduced the agreement to writing, agreed on the risk, and fixed the amount of damages, to be deducted out of the last bond, if, before it became due, the dam should break. He can get no other damages, but the sum so stipulated for.

1 *Fonbl.* 141-4.

Young, *Lyon*, and *Galbraith*, for the plaintiff. The objection is made on a *petitio principii*. This indorsement is not a note of the contract. It is a sort of postscript to a bond for the payment of the price, providing for a compensation for a certain contingency, not relating to the essential part of the contract, that the dam was founded on a rock. In cases like this, as on policies of insurance, parole evidence of want of good faith is constantly admitted, as evidence of facts, within the knowledge of the insured, increasing the risk.

Contracts will not be enforced, where there is ignorance or error, in fact or in law; and will be set aside for fraud. There could be no relief against fraud, unless parole evidence of it were admitted.

1 *Fonbl.* 106.
Kaim's Prin.
Eg. 86, 259.

PRESIDENT. If this writing had been a statement of the contract, there would have been strong reasons for rejecting parole testimony of the representation; as, when parties reduce their conversations to writing, that alone ought to be considered as the deliberate and con-

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clusive agreement. This writing does not clearly seem to be a statement of the contract. The action is for a fraud in misrepresenting a thing within the knowledge of the seller, and not of the buyer; in representing the dam as founded on a rock, when it was not. The foundation might not be *bad*, though not founded on a rock. The writing is to secure a certain compensation, on the contingency of the dam breaking within three years, by reason of a bad foundation only. The dam might not break within that time, though not founded on a rock; and yet might be much less valuable to the buyer, than if founded on a rock.

Parole evidence of a contract may be inadmissible, when a contract is reduced to writing; and yet parole evidence of fraud may be given, of what cannot appear in the writing, viz. the variance of the thing sold from the representation made of it in the contract.

The principal difficulty in this case is, to know whether the writing means the same thing by a *bad foundation*, that the declaration means by *not being founded on a rock*; and whether providing compensation for the dam breaking, by reason of a bad foundation, is not waving all other objections to the dam.

Upon the whole, we think it best, to admit the testimony, and reserve the point.

It was then proved, that, at the time of the sale, *Work* had suspicions, that the dam was insufficient, and objected to it, for want of an apron; that *Grier* said, it was as good a dam as any on the creek, that there was no occasion for an apron, for it was founded on a rock, and that was better than an apron. It had been founded on a rock; but the fall of the water over the dam had broken through the rock, for a considerable distance in the middle of the creek, and occasioned a cavity, through which a considerable part of the stones in the dam had fallen and been washed away, so that part of the dam was hollow. It had not however given way, and it was uncertain whether it would, merely on that account. That would depend on casualties, as ice lodging on the breast, &c. This state of the dam was not generally known, till in the summer after the sale; but there was some reason to believe, that it was in this state, at the time of the sale, and probably that *Grier* knew

it. The dam continued to serve its purpose, and the mill went, when other mills on that creek went.

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Young, for the plaintiff. An action lies for cheating by false dice, and for selling one commodity instead of another. Fraud or concealment of any material circumstance will be relieved against, notwithstanding a warranty.

3 *Cem.* 166.1 *Bro. Chan.*

440.

1 *Fonbl.* 134.

Campbell, for the defendant. 1. Fraud will not be presumed. You have no evidence, that the dam was not, at the time of the sale, as represented. All the evidence is five or six months after. If there was a misrepresentation, every misrepresentation will not justify the rescinding of a solemn contract. To do this, it must be wilful, and known to the party.

1 *Fonbl.* 109.

10.

2. Here is a written agreement entered into at the time of the sale, for ascertaining the damages, in case the representation should fail. *Work* had no confidence in the representation of *Grier*, and relied on this agreement for fixed damages to be obtained at a certain future time.

2 *Powel**Contr.* 208.

Young. We differ not as to principles of law; but as to the weight of evidence. The cases read apply not to this. We are not suing for a penalty, nor for rescinding the contract, and recovering back the money paid, but for damages for a misrepresentation which has made *Work* pay a greater price, than he would have paid, if the dam had been truly described.

PRESIDENT. If there be a wilful misrepresentation, or concealment of any material circumstance, this is a fraud, and damages must be given, proportioned to the consequences of the buyer's confidence in the assertion of the seller.

2 *Powel**Contr.* 203.

If, though there be no wilful misrepresentation or concealment, there be an undertaking, at the time of the sale, that the property sold is such, as, in a material circumstance, it turns out not to be, damages must be given.

But we would impress it strongly on you, that a presumption of great force arises from the writing, that *Work* took on himself all risks, except that of the dam breaking in three years, by reason of a bad foundation; and, for that risk, has measured his damages, and settled the mode of compensation.

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The jury found a verdict for the plaintiff for 312*l.* 10*s.*

NOTE.—This case had been tried at the preceding term, and a verdict found for the plaintiff: but the jury said, they could not ascertain the damages. At the subsequent term, there was a motion for a new trial, which, without any interference of the court, was ended by a compromise.

MOSES HALL v. ELIJAH MOOR.

THIS was an action of trespass for taking two horses, two cows, and a steer.

Moor was a constable, and an execution of a judgment before a justice against *Richard Hall*, a son of *Moses*, was put into his hands. *Moses* had, about two years before, removed, from the plantation on which he formerly lived, to another about sixteen miles distant from it, and left his son *Richard*, a married man with a family, in possession of his plantation and the cattle in question, together with smith-tools and other property. *Moor* took the cattle in execution, and sold them for the debt of *Richard*. Two warrants from the justice, who had given the judgments against *Richard Hall*, were offered in evidence.

Meason, for the plaintiff, objected to them, because they were not directed to any one, but to the constable of ; and because they were dated 12th May, 179 . *Moor* is not constable of the township in which *Richard Hall* lives, where the cattle were taken.

Lyon, for the defendant. The twenty pound law is to be considered as distinct from the other laws giving jurisdiction to justices. The 9th section says, "upon delivery of an execution to any constable." These warrants are for debts above 10*l.* and we can prove, that they were delivered to *Elijah Moor*, a constable.

PRESIDENT. No answer has been given to the objection. We see no authority given to *Elijah Moor*. The omission is too gross to be overlooked.

Kennedy and *Lyon*, for the defendant, moved for a nonsuit. This action is not maintainable. The plaintiff was not in possession, and possession is necessary to

support trespass. The plaintiff ought to have brought Trover, when he could have recovered, on proving property in himself, and conversion by the defendant. This is decided in the case of *Ward v. Macauley*. There the plaintiff had leased his house ready furnished to lord Mountfort. On an execution against the tenant, the sheriff seized part of the furniture, though he had notice that it was the property of the landlord *Ward*. For this, trespass was brought. At the trial lord *Kenyon* thought, the plaintiff should have brought trover. A verdict however was taken for the value of the goods, with leave to move for a nonsuit. On a motion for this purpose, lord *Kenyon* said, "The distinction between the actions of *trespass* and *trover* is well settled; the former is founded on possession, the latter on property.—Here the plaintiff had no possession; his remedy was by an action of trover, founded on his property in the goods taken." The rule for a nonsuit was made absolute. The case before this court is so like that case, that I cannot doubt, that a nonsuit will be ordered here.

It may be said that, in that case, there was a lease for a limited time. In this case there is a surrender of the possession similar to that. In that case, there was a lease, which fixed the terms on which the possession was given. In this, none but the father and the son knew the terms, and a deceit was imposed on all others.

Trespass is not maintainable where possession is in another by delivery; except in cases of necessity that there may be a remedy for a right. A rector may maintain trespass for taking tythes set out, for possession is construed to follow separation. So may a carrier from principles of policy, to protect commerce in a fluctuating state. Here, there is no necessity for a constructive possession in the father: the relation subsisting between him and his son will rather couple a right with the son's possession; and the father may have remedy against the son. And, having parted with the possession, he is excluded from the remedy of an action of trespass which is given for a violation of possession; and must recur to trover, by which redress is given for a violation of right. Property alone will not alone support trespass. If trees be cut by a stranger on land leased, the owner must bring trover, and the tenant trespass.

1793.

4 T. Rep. 489.

3 Woodeson,
263.

1798.

Campbell and Meason, for the plaintiff. The case of *Ward and Macauley* differs from this case. There, the plaintiff had parted with the ownership of his property, for a limited time; and the tenant had an interest, which might be seized by his creditors. Here, there was no contract for any time; and the plaintiff might take them when he pleased. *Richard Hall* had no interest to be taken. He was a mere agent, and had only a care or oversight of the property, as a butler or servant. Trespass lies for breaking open a box, delivered to keep, and taking goods out of it; for wherever a man has neither a general nor a special property, and he converts goods, trespass will lie.

Bull. Ni. Pri.
83.

PRESIDENT. It is contended that *Moses Hall* cannot support trespass, because he had not possession of the property taken, at the time of the taking, and possession being essential in trespass, the plaintiff must be nonsuited; and may bring trover, which can be supported on property alone without possession.

4 *T. Rep.* 490

Bull. Ni. Pri.

83.

See 5 *Bac.*

Abr. 164.

5 *Com. Dig.*

577. s.

3 *Woodeson*,

212.

1 *Burr.* 31.

On the other hand, it is contended, that property alone without possession will support trespass; and that, (if it were otherwise) in this case, the possession of the son is the possession of the father, for the son was but his agent.

There is a material difference between trespass and trover. Trover waves the trespass in taking, admits the possession to have been lawfully gotten, and proceeds to recover damages only for the unlawful conversion. In trespass, a jury may also give damages for the taking.

The motives are peculiarly strong to support this distinction, in favour of an officer compellable to take the goods of a certain person, when property ought to be presumed from possession, and the taking to be viewed in the most favourable light, and, if possible, not as a trespass.

However, as it is to be wished, that the dispute between these parties may be soon terminated, and there are circumstances, which may induce the jury to find for the defendant; we will not direct a nonsuit, but give the defendant leave to move for a nonsuit after the verdict.

Lyon and Kennedy, for the defendant, contended, that possession was evidence of property, or of a fraudulent

intention to deceive creditors, which would be equivalent. If one taking goods in execution, leave them in the possession of the owner, a subsequent execution will take and hold them. 1798. *T. Rep. 596*

Campbell and *Meason*, for the plaintiff. This is not an action against a constable, but against *Elijah Moor*, who, though a constable, has not been able to shew any authority for taking the goods in question. There was no collusion nor deception of creditors: all the country knew the property to be in *Moses Hall*.

PRESIDENT. The first question is, whether the property be the plaintiff's, or his son's. If his son's, the plaintiff has suffered no damage, and can recover nothing. If the plaintiffs', you will find in damages the value of the property taken, but no more; for, having left the property in possession of his son, he gave reason to believe, that it was his son's, and an officer, under such circumstances, ought not to be punished.

2. Possession is evidence of property, or of a fraudulent collusion between the owner and possessor; and he, who gives the credit, must bear the loss. The question then will be, whether *Moses Hall*, in leaving this property in the possession of his son, did any thing more, than is usually done, without implying any right; or, whether he meant it as an advancement to his son; or, though he did not mean it so, whether he gave reason to believe this, and, thereby, gave a false credit to his son. If he either meant that the cattle in question should be the property of his son, or that this should be believed, you will consider the property as accompanying the possession, and you ought to find for the defendant..

The Jury found a verdict for the plaintiff, damages 43*l.* 17*s.* 6*d.*

NOTE. A nonsuit was moved for at the next term. But as the court, to induce the parties to a compromise, had given no opinion, when these notes were concluded; I have incorporated the arguments and observations on the motion for a nonsuit after verdict, with those made on the trial.

WASHINGTON COUNTY.

February Term, 1799.

LUCY, a Negro woman, v. REASIN PUMFREY.

1799. **L**UCY brought a writ *de homine replegiando* against the defendant, who held her as a slave. It was admitted, that on or before 1st March, 1780, and between 1st L. 338. that, and on and after 1st January, 1786, Reasin Pumfrey was an inhabitant of that part of the county of Westmoreland, which, in 1781, was erected into the county of Washington, of this state; and, during the whole of that time, held Lucy with him, as a slave; and since that time, and till the suing out of this writ, has held her, as a slave, in Virginia; and that, after 13th April, 1782, 2 St. L. 55. and before 1st January, 1783, Reasin Pumfrey registered, with the clerk of the sessions of Washington county, the following Negro slaves, to wit; Rachel, a female, aged 28 years; Ruth, a female, aged 13 years; Ben, a male, aged 10 years; Dinah, a female, aged 8 years; Lot, a male, aged 4 years; and Kate, a female, aged 6 months.

Simonson, for the defendant, offered parole testimony, that, at the time of the registration, Pumfrey had but six slaves; that among them was Lucy the plaintiff; that she is the slave registered by the name of Ruth; and that she was never known by the name of Ruth.

Campbell, for the plaintiff, objected to the admission of this testimony. It would defeat the purposes of identifying, by the registry, those slaves, who, after 1st November, 1780, or 1st January, 1783, should be held as slaves; and would reduce the whole system to the evanescent, precarious, and delusive test of parole evidence; the memory or faith of witnesses to distant transactions. It would be to admit presumption in favour of slavery, and against freedom and the record. The presumption ought to be otherwise, that, the name of the plaintiff not appearing on the record, she has never been recorded, and is, therefore, free.

Simonson. I admit that this act ought to be construed liberally in favour of freedom, and strictly against pro-

party. But it must be so construed, as to effect the intention of the legislature, and produce the least mischief. It is sufficient, if we can establish, that the plaintiff was, at the time mentioned by the law, and yet is, the slave of *Reasin Pumfrey*, and the same person registered by the name *Ruth*. The description of *Ruth*, as to age, sex, and colour corresponds with the sex, colour, and age at that time of *Lucy*.

1799.

PRESIDENT. The question may be of considerable importance, and deserve further discussion; I hope, therefore, the party against whom our opinion is will put it in a way of being examined on a writ of Error. And I am glad, for this reason, that our opinion happens to be against the party best able to do this.

We do not admit the testimony. It would reduce that certainty of a registry, intended by the law, to a state of absolute uncertainty. An error in the christian name is essential, unless corrected by another description annexed, as wife, bishop, earl, &c. Fraud and perjury would be let in, to defeat the purposes of the law, and make slaves of *Negroes* really free. The fault lies with the master, and he must bear the consequences.

Simonsen tendered a bill of exceptions.

There was a verdict for the plaintiff.

ALLEGHENY COUNTY,

March Term, 1799.

PENNSYLVANIA v. JAMES STOOPS.

STOOPS was indicted for the murder of *Catharine*, his wife.

Her death was occasioned by burning. Her back, thighs, and legs were severely burnt. She survived it about three weeks.

Her deposition taken in writing by a magistrate, about five days after the burning, and signed by him, was offered in evidence.

1799.

J. Campbell for the prisoner, objected to this testimony,—1. If the wife had been alive, she could not have been admitted for or against her husband. This is a general principle: they are but one person in law. Lord *Audley's* case is the ground on which all exceptions to this rule have been founded; and it is now settled, that this case is not law. If she could not have been a witness, while alive, her deposition cannot be read after her death. For, if a witness be incompetent, when the deposition is taken, competency when it is offered in evidence will not make it admissible. It is true, that, after the death of the wife, one reason for this rule, the maintenance of domestic peace, and mutual confidence, no longer exists: but the rule is general, and controls all other considerations.

2. This deposition is not signed by the deponent: it is, therefore, imperfect and inadmissible.

Galbraith, for the state. The necessity of the case often requires the admission of interested witnesses, as in larceny, &c. Personal force and secrecy are reasons for admitting the testimony of the wife against the husband. The deposition of a witness, afterwards dying or unable to attend, may be read. A wife is a witness against her husband in an indictment for an assault and battery.

PRESIDENT. I have been generally impressed with an opinion, that, in cases of secret personal injury, a wife may, on her own testimony, obtain protection against her husband, and be a witness, to procure his punishment. She may obtain surety of the peace from him, on her own oath. The only or chief ground, on which this has been doubted, the maintenance of conjugal peace, exists not after the death of the wife.

The objection, that the deposition is not signed seems to rest on cases of examinations under certain acts of parliament, or of unfinished examinations. But if the declarations of the dying person had not been written, nor sworn to, would they not have been admissible?

In the case of the *King v. Reason and Franter*, the dying declarations of Mr. *Luttrell*, though not on oath, were given in evidence by a witness who heard them. And it was held, that a paper, on which his declarations on oath were written by the same witness, who was not a magistrate, though not signed by Mr. *Luttrell*, or by

the magistrate who administered the oath, would have been better evidence, than the memory of the witness. 1799.
 In *Woodcock's* case, the dying declarations of a wife murdered by her husband, taken on oath, and reduced to writing by a magistrate, and signed by him, with her mark made on the paper in approbation of its contents, were admitted in evidence on an indictment of murder against the husband; and, on this testimony, he was convicted and executed. This case was tried before judges of great learning and talents. Nor does it seem absolutely necessary, for the competency of such evidence, that such declarations should be made under an immediate apprehension of death, though that be one great ground of their competence and credit. *Leach's Ca.* 437.
Radburne's case, Leach 399. Woodcock's case, Leach 437.

We will admit the testimony: but the point may be reserved.

The magistrate who took the deposition proved, that it was drawn up in the words of the deceased. It stated, that on a frivolous offence, after scolding her, *Stoops* threw her on the fire, that she escaped from him, and got out of doors, that he pursued her, dragged her in again, threw her again on the fire, and held her on the fire, and burnt her so as she then was.

Galbraith then offered to read a confession of *James Stoops*, written on the same paper, by the same justice.

J. Campbell objected, that this confession was not signed.

PRESIDENT. I consider this objection as arising out of the particular provisions of the English statutes.—*Gilb. L. of Ev.* 137-9.

We will admit the testimony: you may have the point reserved if you please.

The confession was proved by the magistrate, and amounted to this:—That she was abusing him, and he had thrown her on the fire; that she got up, and run out of the house, and, when she came in again, her cloaths were on fire. He denied that he dragged her back into the house; and he gave no answer, when asked whether he had thrown her into the fire a second time.

In all her conversations after the burning, she declared, that her husband threw her into the fire, and charged him with her death. He refused to let a physician be called to her:—One was called. He was examined as a witness; and said, that, in some places, the skin and muscles were burnt away; in some places, her

1799.

flesh was like roasted meat, and, in some places, there were ulcers; that it appeared impossible that she should survive; and that the burning caused her death.

It was proved, that both husband and wife were addicted to drunkenness, were often drunk, and quarrelled and fought with each other; that she was often the aggressor; that they were both drunk in the morning of the day on which the burning happened, that they were left alone in the house in that condition, before the burning; and found so, and in very ill humour with each other, after it.

The prisoner's counsel urged, that the throwing on the fire might be accidental, or in self-defence; and the burning be from incapacity in her to rise, or him to raise her; and that the killing was but homicide *per infortunium*, or, at most, manslaughter.

Galbraith, for the state, admitting that it was not murder in the first degree, earnestly contended that it was murder in the second degree.

The jury found him guilty of voluntary manslaughter; and he was sentenced to imprisonment and hard labour for five years.

GILES, a Negro Man, v. JOSHUA MEERKS.

ON a writ *de homine replegiando*, a certificate of the registration of the plaintiff as a slave, on 19th December, 1782, was produced, under seal, from the clerk of the sessions of *Washington* county.

Brackenridge, for the plaintiff, offered evidence, that *Hull*, the master who then owned him, had confessed, that *Giles* was not registered, till after *January*, 1783. The act of 13th *April*, 1782, requires a registration before *January*, 1783.

2 St. L. 55.

Semple, for the defendant. Proof of this kind would destroy the record: and this cannot be done by parole proof.

Brackenridge. This act has been construed liberally in favour of the master; and, considering the act of registering as a ministerial act, though informal, it has

been held sufficient. But it will also be construed liberally in favour of liberty, and considered as a ministerial and not a judicial act; it may be impugned by proof of fraud. It is not a record against which nothing can be averred; but resembles the certificate of recording a deed.

1799.

PRESIDENT. Proof of fraud in the entry of *Giles* is proper. But, as there may be a doubt, whether this proof, as against *Meeks*, the present master, may be made by declarations of *Hull*, we will admit the testimony, reserving this point.

It was then proved, that, after the year 1782, and perhaps in 1784, *Hull*, being asked whether he had recorded *Giles*, said no; that, at a certain time after the year 1782, he said, he was going to *Washington* to have his Negro recorded, meaning *Giles*; and that, when he had returned, he said, he had got it done; and that, perhaps in 1784, having been admonished to have his Negro recorded, he said to *Meeks*, (the defendant) who also had Negroes, that one or other of them must go to *Washington*, and have their slaves recorded.

The defendant produced a witness, who swore, that in 1783, he asked *Hull*, whether he had recorded his Negro, and he said, he would be very sorry to leave such property in risk; and, that he and *Joshua Meeks* both had their Negroes recorded.

Simple, for the defendant. The proof for the plaintiff is too inaccurate as to distant dates, to be received to contradict an official act and certificate; especially when that proof is opposed by contradictory proof.—*Hull* was under no obligation to give true answers to every impertinent question.

Brackenridge, for the plaintiff. The entry is impugned by direct declarations with precise dates, ascertained by circumstances. The proof for the defendant opposes not, but confirms, that given for the plaintiff. *Hull* does not say, that he recorded *Giles*; but, by evading a direct answer, seems to admit, that he had not. Notice is also brought home to *Meeks*, and he is, therefore a *mala fide* purchaser.

PRESIDENT. Though we have said, that proof of fraud in the entry of *Giles* is admissible, yet such proof

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ought to be weighed with scrupulous caution, when set up against an official act. Every reasonable presumption ought to be made in favour of the certificate. It was not uncommon for one to enter the slaves of another his neighbour or friend, without the knowledge of the proper master. You will consider to which of the witnesses *Hull* spoke the truth. If you disbelieve the testimony on the part of the plaintiff, or have sufficient ground to believe, that *Giles* was entered before *January*, 1783, though *Hull* knew it not; you will find for the defendant. But if you believe, that *Giles* was not entered till after *December*, 1782, you will find for the plaintiff, notwithstanding the certificate of entry in *December*, 1782.

The jury found a verdict for the defendant.
Mr. *Brackenridge* moved for a new trial.

WESTMORELAND COUNTY.

March Term, 1799.

PENNSYLVANIA v. HENRY BECOMB, JOHN READING,
JAMES ECKLES, and SAMUEL DICKSON.

THESE men lived on the frontier of *Westmoreland*, near *Lycoming* county. *Becomb* and *Reading* went, as they said, to trade with two *Indians*, who had a hunting camp on the frontier of *Lycoming*, near *Westmoreland* county. They had with them half a peck of salt to buy deerskin for *moccasins*. On their way, they persuaded one *Shallenberger*, (a lad who then worked at a house to which the *Indians* sometimes came, to trade for corn) to go with them, to shew them the camp; and he took with him half a gallon of whiskey. The *Indians* were absent, when they went to the camp. There was no fire in the camp; but there were deerskins there hanging on poles, bearskins, deer-tallow, bear and deer meat, &c. *Becomb* and *Reading* carried off twenty-six deerskins; and a few days after returned with *Eckles* and

Dickson, and they plundered the camp of every thing, except a little deer-meat. 1799.

The *Indians* had behaved peaceably, occasionally came into the settlement to trade, and traded honestly. Finding their camp plundered, one of them came to the house where *Shallenberger* had worked, and, by signs, complained of their loss. Some men of the house returned with him to the camp; where the *Indians* signified the articles which they had lost; shewed, by a notched stick, on which they had marked an inventory of their peltry, that they had been plundered of sixty-eight deerskins, and nine bearskins; and signified the loss of about 40lb. weight of deer-tallow, 60lb. of bear meat, two yards of brown woolen cloth for *leggings*, two yards of callico, and one cotton handkerchief. The men to whom the *Indians* thus disclosed their loss, conducted them to a magistrate, who, on their complaint, issued a warrant to search for the goods, and, on the information of *Shallenberger*, a warrant to apprehend *Becomb* and *Reading*, and also *Eckles* and *Dickson*, against whom suspicions appeared. *Becomb* and *Reading* were committed to gaol; but, there not being sufficient proof against *Eckles* and *Dickson*, they were discharged. On a further search, the constable found nineteen deerskins, two bearskins, and a piece of brown woolen cloth, like the *leggings* which one of the *Indians* wore, hidden in a bark box under two trees which had fallen near *Becomb's* house. *Becomb's* wife desired them not to touch the bark, for she had meat there; and, when opened, she claimed the woolen cloth as hers. Finding the constable would take all away, she declared, that her husband should not suffer alone; that *Eckles* and *Dickson* went with him and *Reading*, (when these last went the second time to the camp) and were the most urgent to go, and threatened violence to the *Indians*, if they met them; and that the skins were equally divided among the four. On her information, the magistrate sent the constable for *Eckles* and *Dickson*. *Eckles* was taken and committed to gaol. *Dickson* had absconded and was not taken.

While *Becomb* and *Reading* were first at the *Indian* camp, they proposed to *Shallenberger*, (as he swore) that he should sell his whiskey to them, and they would pay

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him as well as the *Indians* would have done. They drank the whiskey. After their return, *Becomb* and *Reading* gave *Shallenberger* seven deerskins, (as he swore) for his whiskey. One of them he had disposed of. The other six he gave up to the magistrate; which, together with the nineteen found at *Becomb's*, made twenty-five of the sixty-eight deerskins stolen; and those, with the two bearskins and piece of brown cloth found at *Becomb's*, were deposited with the magistrate.

Becomb and *Reading* were tried, on one indictment, for stealing twenty-six deerskins; and they and *Eckles* were tried, on another indictment against them and *Dickson*, for stealing forty-two deerskins and the rest of the property lost by the *Indians*.

Leasb's Ca.
351.

Brackenridge and *Young*, for the prisoners. The taking seems to be proved; but it is not felonious. It was in open day and avowed, and is but a trespass. The property was abandoned, and not in possession of any one. The *Indians* had no property in the things taken. They had no right to come upon our lands to hunt. They were trespassers on the lands of the state, or of some private person. And felony cannot be committed by taking things whereof no one had property, as wreck, or things *feræ naturæ*, as deer, or fish in a river. It may be a misdemeanor; and, if the jury find it so specially, the court may give judgment, on this indictment, as for a misdemeanor.

1 *Hawk.* 143-
4.
2 *Hawk.* 612-
6.

Galbraith, for the state. An indictment lies for stealing goods of a person unknown. This property was as much in possession of its owners, as property of such nature, and of such owners, usually is. An indictment will lie for stealing a horse in a pasture, or in the commons, as well as in the stable.

PRESIDENT. The taking seems proved; and the ordinary evidence of the felonious intention, a denial of the act, appears in this case. There is even ground to believe, that they left their homes with this intention. Half a peck of salt was but a poor stock to trade on.

4 *Comm.* 232.

I know no law rendering it unlawful for an *Indian*, any more than a white man, to hunt on the lands of others. Whether the *Indians* were trespassers or not, the authorities cited prove that they were not thieves. Their labour in killing the deer and bears, *feræ naturæ*,

gave the *Indians* a property in the skins, meat, and tallow of those animals. It would be strange, if the taking could not be felony because it was in the day time, and the offenders impudently avowed it among themselves. The property was as much in the possession of these *Indians*, as articles of this nature usually are. And if you think the prisoners took and carried them away with an intent of converting them to their own use, without the knowledge of the owners, there is no occasion for your finding a special verdict; you may find the prisoners guilty.

The jury found them guilty.

Becomb, *Reading*, and *Eckles* were then tried on the second indictment, and found guilty.

NOTE.—Next day, before judgment was given, *Becomb* broke out of gaol. *Reading* and *Eckles* were sentenced to 18 months confinement to hard labour, on the last indictment; and *Reading* to 6 months additional, on the first: and it was ordered, that the whole should be in the gaol and penitentiary house in *Philadelphia*.

In the morning after the last verdict was given, a man went into the gaol, to endeavour to get, from *Reading* and *Eckles*, information respecting the rest of the skins. They informed where they were hidden; and messengers were sent to secure them, and restore them to the *Indians*. The *Indians* were present at the trial: they appeared to be poor, and from a sense of the loss which they had sustained, and of the danger which resentment for such loss might bring on the frontier inhabitants, and a desire to shew the *Indians* the benefit of appealing to our tribunals for redress; some gentlemen contributed about 40 dollars, which were laid out in cloathing, and other useful articles for the two *Indians*; with which, and assurances of restitution for their property lost, they departed well pleased.

1799.

Lessee of JACOB WELKER v. PRISCILLA COULTER.

1799.
w

THIS was an Ejectment for a messuage and 300 acres of land, in *Franklin* township, brought to *March* term, 1798.

The plaintiff shewed a warrant, dated 8th *January*, 1773, for 100 acres of land, on a branch of *Turtle-creek*, on the north side of general *Forbes's* old road, and on the south side of the path leading to *Plumb-creek*; including a white-oak, marked *J. W.* standing on the west side of the bottom of said branch; in *Fort-Pitt* township, in the county of *Westmoreland*. He then shewed a survey of 255 acres and the allowance, made, on this warrant, 25th *June*, 1773, by *Eli Coulter*, deputy of *Robert McCreagh*, who was deputy surveyor of the district in which the land is.

The defendant, (who is the widow of *Eli Coulter*) claiming under the same title produced a conveyance, dated 26th *July*, 1787, for the consideration of 20*l.* by *Jacob Welker* to *Eli Coulter*, of this warrant and all the land surveyed or to be surveyed on it; and a patent to *Eli Coulter*, on the survey made by him, dated 31st *March*, 1789.

The plaintiff's counsel then proposed to prove, that the conveyance from *Welker* was fraudulently obtained. And evidence was given, that, in *April*, 1787, when a deputy surveyor came to make a survey of this land for *Welker*, on his warrant, *E. Coulter* represented, that he had a survey of it made on an early location, and that perhaps then there was a patent; that, however, as he could lay *Welker's* warrant on adjoining land, which would be useful to him, he would buy his warrant, and put an end to dispute; that he did then buy it, for 20*l.* and had a survey of 40 acres adjoining made on it; and that he afterwards returned his former survey of 255 acres on *Welker's* warrant, and took out a new warrant for the 40 acres.

It was then proved for the defendant, that *E. Coulter* had an old improvement and settlement, which had been begun in 1772; that a cabin was then built, and three acres of land deadened. In 1773 *Coulter* and another

man with him worked occasionally on the land, cleared out the three deadened acres, sowed that with turnip seed, and, in the fall, with rye. In 1774, the inhabitants of that part of the country were driven off by the *Indian* war. In the spring of 1775, *Coulter* put a tenant on this land, who resided on it, cleared out the old ground and 5 acres more, planted 4 acres in corn, and that and all the rest in fall grain. In 1776, another field of 4 acres was cleared by *Coulter*. In 1777, *Coulter's* tenant was driven off by the *Indian* war; and that part of the country being generally deserted, till after the war, nothing more was added to the improvement, till about nine or ten years ago, when *Coulter* put a tenant on it, who yet remains. There are now 30 acres of up-land, and 10 acres of meadow, cleared, fenced, and cultivated.

Coulter had no tenant living on the land in 1787, when *Welker* came to survey; and there was contradictory testimony as to the extent of his improvement in 1773, when *Welker* first visited the land, found *Coulter* working on it, and told him he had a warrant for it.

There was testimony also, that, at the time of making the purchase of *Welker's* warrant, *Coulter* represented his title as resting on his settlement; but said also, should that fail, he had, or he could have, an old location; the witness who proved this did not hear him speak of a patent, but had heard him say, before he saw *Welker* or knew any thing of his claim, that he had a location in the name of *James McClure*. *Coulter's* survey was made in 1772. He died seven or eight years before this ejectment was brought.

The description in the warrant did not precisely and exclusively designate this land, and there was no evidence of a tree marked *J. W.* on it.

Brackenridge and *Morrow*, for the plaintiff, stated, that the purchase being founded on a gross misrepresentation, a *suggestio falsi*, by *Coulter*, in saying he had a title, when it is evident that he had none, is fraudulent, and therefore void: and the title of *Welker* stands as if he had made no conveyance.

No subsequent transactions will confirm a fraudulent bargain, nor length of time bar a claim of relief against it. Equity relieves against a mistake or misapprehen-

1799.

1 *Wils.* 239.1 *Fonbl.* 113,

128.

1 *Wils.* 320.1 *Fonbl.* 322,

106, 60.

1 *Wils.* 295.

1799.

sion of title, against undue advantage taken of necessity, or where weakness of understanding founds a presumption of undue influence.

2 St. L. 282,

Young and McKeehan, for the defendant. The act of assembly bars any action for land, on a claim founded on a warrant without a survey, unless the party has been in possession within seven years. It is in proof, that *Welker* never had a survey nor possession. Laches are not indulged. *Welker* has lien by an unreasonable time, not only during the life of *Coulter*, but since his death; and there is reason to suspect, that he is not the person really interested in this suit, and that others have stirred it up. If *E. Coulter* had been now alive, he could have explained and established the representation of his claim, which he made to *Welker*: and we are not to believe, that, before his purchase of *Welker's* warrant, *Coulter* had no location for this land, because he afterwards returned his survey on this warrant. He had paid a great price for the warrant, and was right in making the best of it. It has been a very general practice in this country, for persons who had old locations, in order to evade the payment of interest on the purchase money, to take out new warrants for their land. When the state had given the *Virginia* claimants their lands so cheap, it was thought by the *Pennsylvania* settlers, that the cheapest method to them was fair.

1 Fenchl. 319.

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PRESIDENT. It is not necessary to embarrass the deliberations on the facts with any consideration of the limitation of this action, as, it being clear that the plaintiff never was in possession, this is a mere question of law.

If *E. Coulter* obtained the conveyance from *Welker* by a fair contract, or, though the contract was not fair, if, at the time of the purchase, he had a better title than *Welker*, there must be a verdict for the defendant.

It is generally understood, that many possessed of old locations have abandoned them, and taken out patents on new warrants. How far this is a fair practice, as respecting the state, is not material, in this action, to enquire. You have evidence, that before *Coulter* knew of *Welker's* claim, he said, that he had a location in the name of one *McClure*. This may have been true, and on this location he might have intended to return his

survey of this land. But after the purchase of *Welker's* warrant, for which 5*l.* sterling must have been paid to the Land-Office in 1773, he might have thought it more advantageous to abandon this location, or apply it elsewhere, and return his survey on *Welker's* warrant. If such be the truth, the transaction is fair, and *Coulter's* title good.

1799.

But if *E. Coulter* represented to *Welker*, that he had an old title, when, in fact, he had none; and if this was the only or the principal motive which induced *Welker* to sell his title; if, without this motive, *Welker* would not have transferred his claim; this is such a fraud as renders the purchase void, and all the title, which *Welker* then had, yet remains in him.

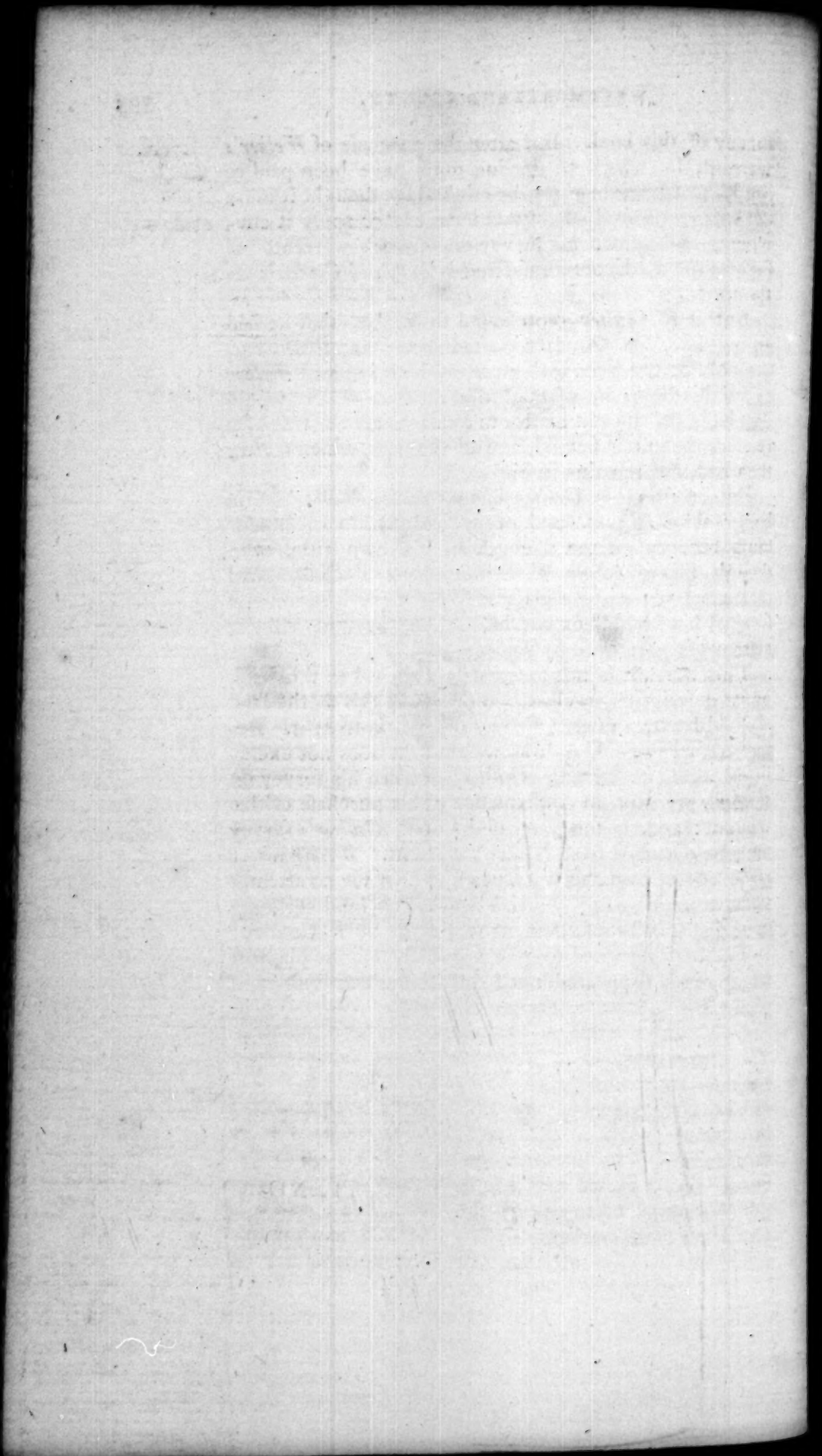
But as fraud in *Coulter* cannot make *Welker's* title better than it was, and every plaintiff in ejectment must recover on the strength of his own title, even though this purchase were fraudulent, if *Coulter* had then a better title by a prior settlement (or location and survey) his fraudulent purchase of the warrant will not destroy his prior title by settlement.

This warrant is not so specially attached to this land, by its description, as clearly to point out this as the land claimed by it, and exclude any other title from it. Before a survey made on this warrant, it does not exclusively affect this land. *Coulter* returned his survey on *Welker's* warrant, in consequence of his purchase of this warrant: and, if the purchase be void, *Coulter's* survey must be detached from *Welker's* warrant. *Welker* never made a survey on this warrant; and he made no attempt to survey, till in 1787; and before that, and certainly in 1775, an actual settlement was made by *E. Coulter*.

The jury returned to give a verdict, but the plaintiff being called, appeared not: and there was judgment of nonsuit.

APPENDIX.

D d



A P P E N D I X.

THIS Preamble is as follows:—"The 3d day of *April, 1769*, being appointed for opening the Land Office for the New Purchase made at the treaty of *Fort Stanwix*, and it being known, that great numbers of people would attend ready to give in their locations at the same instant; it was the opinion of the governor and proprietary agents, that the most unexceptionable method of receiving the locations, would be to put them all together (after being received from the people) into a box or trunk, and after mixing them well together, to draw them out, and number them in the order they should be drawn, in order to determine the preference of those respecting vacant lands. Those who had settled plantations, especially those who had settled by permission of the commanding officers to the westward, were declared to have a preference. But those persons who had settled or made, what they call improvements, since the purchase, should not thereby acquire any advantage. The locations (after being put into a trunk prepared for the purpose, and frequently well mixed) were drawn out in the following order.

The act of 1st *April, 1784*, confirming the boundary line between this state and *Virginia*, having recognised private rights established under that state, makes good certain titles derived from that state to land within this.

There are some titles for land in this state granted for military services to *Virginia* officers, under the king's proclamation of 1763.

Previous to the ratification by *Virginia*, of the boundary line, the Assembly of that state had by law, directed commissioners to grant to actual settlers certificates of a right to four hundred acres, including their settlement. There are many titles under this law to lands in the south western part of this state.

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2. But under the 17th section of the act of 1794, the best way is, to frame the indictment specially, 5-8
3. Every unlawful killing is *prima facie* murder; for malice is presumed, unless the prisoner shew circumstances which take away this presumption. 148-161-257-282
4. Wanton or cruel exercise of authority is no extenuation of homicide, but evidence of malice. - 149
5. Passion, arising from sufficient provocation, is evidence of absence of malice, and reduces the homicide to manslaughter. - - - 149-161-2
6. Interfering in favour of a friend, reduces the homicide to manslaughter; but this ought to be, while the person of the friend is in danger. - - 149
7. Malice defined. Malice is a question of law. So is Provocation. Court must ascertain the description of the offence, and fix the degree of it, which the facts proved compose. - - 148-9-161-2-256-7
8. Passion without provocation, or provocation without passion, will not reduce the killing to manslaughter: and, where there is both provocation and passion, the provocation must be sufficient. - - 162
9. What is sufficient provocation? Words or contumelious gestures are not, if the killing be with a weapon likely to kill. - - 163
10. Killing on an old grudge, or with a weapon prepared for the purpose, is murder. - - 165

11. Killing by a blow in a mutual conflict, without necessity either for the protection of life or the possession of house, &c. is manslaughter. If necessary for such purposes, it is homicide in self defence. - 248
12. On indictment for murder, and evidence of only homicide in self-defence, jury may acquit. - 248
13. It seems to be the intent of the act of assembly, to use the distinction between express and implied malice, to distinguish murder of the first and of the second degree. 256—282-3
15. Manslaughter, though distinguished into voluntary and involuntary, with respect to the punishment, remains, in other respects here, as in England. - 256
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16. To make killing premeditated, it is not necessary, that the design should be long formed : it is sufficient, if the design precedes the act. - 257
17. Drunkenness does not incapacitate for forming a design of killing, but often suggests it. But, as it clouds the understanding, and excites passion, it may be evidence of passion only, and of want of malice and design 257
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21. Killing, in a mock-fight by consent, may be but manslaughter. - 280-3
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See Assumpsit.

1. On Indebitatus Assumpsit for money had and received, brought to recover the price of land sold, the jury found damages beyond the price. - 22-4
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3. Indebitatus Assumpsit for money had and received. Evidence of money paid as difference in an exchange of horses, and of money received by the defendant on a subsequent sale of the horse, given by the plaintiff, and that the horse given by the defendant was stolen and reclaimed by the owner, is good evidence to support the action. - - - 271-2

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2. On an Indictment, found at March sessions, and tried on 14th June, 1792, stating the offence on 27th June, 1792, after conviction, judgment was arrested. 36
3. If an Indictment, which ought not, conclude *against the form of the act*, those words may be struck out as superfluous. - - - 171
4. The words *languishing did live*, in an Indictment for murder, are not essential, and may be struck out 173
5. Defects in the caption of an Indictment, as *not naming the judges, the jurors, the place, &c.* which might be fatal, if the Indictment were so removed into a superior court, may be supplied in the court where it was taken, by reference to other records there. - 174-80
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7. Indictment for raising a *liberty pole*, during the Insurrection of 1794. This, as a notorious expression of opposition to the government, is an offence. Raising a pole in the street is a nuisance. - - 275-6
8. Indictment against a juror for voluntary intoxication. 290

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THE PRINCIPAL MATTERS.

xv

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In an action for the price of land in a foreign country, its title comes incidentally before the court and may be decided on. - - - 235

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Any prosecution, carried on knowingly, wilfully, and wantonly, or obstinately, not for redress, but vexation, is Malicious. 270

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2. But it may be considered absolute, according to the intention of the parties. - 357-8

3. A man going into possession under a contract is not to be considered as a trespasser; but may claim for improvements. - - - 358

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 2. But if he sell part of the goods, as a payment of his individual debt, the other partner is bound by his act; and the purchaser from the partnership is discharged. 260
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PAYMENT.

See Baron and Feme, 5, 6. *Bill*, 2, 3. *Mortgage* 3.
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1. The duty on stills and distilled spirits is demandable, though there be no Inspection office in the district prescribed by law. 314
2. The existence of an Inspection office is necessary only for demanding the penalty for not entering. 314
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RIOT.

See Evidence 18.

1. To make one a party to a riot he must be active either in doing, or countenancing or supporting; or ready, if necessary, to support the unlawful act. 191-281-2
2. But those who stand by, without endeavouring to prevent or restrain a breach of the peace, are to blame; and if the passions of the injured person so mislead his judgment, as to prosecute them as parties, their fate is not to be regretted. 191
3. Collecting a party, for any purpose of a violent tendency, renders the authors guilty of all consequences plainly to be foreseen. 277

4. It is a Riot, if a number of persons assemble in a town in the dead of night, and by noise, or otherwise, disturb peaceable citizens. - 277
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Settlement is *prima facie* evidence of the fairness of the items and of the balance being due; but not always conclusive. - 260—344

SETTLEMENT OF LAND.

See Ejectment, 2.—Evidence, 18, 19, 20.—Survey, 5, 6.

1. Actual Settlements were protected against warrants, before the law of December, 1786. - 54—255
2. An improvement, consisting of an unfinished cabin and rails cut, gives no title to land, as a Settlement does. 251
3. Though a Settlement may intitle the settler to the quantity usually surveyed, he may limit his claim to a less quantity; and if he do, and another procure a title for the adjoining land, the settler is bound by his own limitation. - 274
4. Actual Settlement defined. - 335
5. Claimant of land by Settlement, having *made*, is excused from *continuing* his Settlement for five years, if he be driven away by the enemies of the United States.—Claimant by warrant is excused from *making* his Settlement within two years, if he be prevented by the enemies of the United States. - 336
6. There are two sorts of settlers; settlers under warrants, and settlers without warrants. - 336
7. Warrant is preferred to an adverse Settlement made subsequent to its entry. Settlement completed previous to entry of warrant is preferred to warrant. - 336
8. Settlement is a question of law and fact; whether such acts were done is a question of fact; whether such acts make a Settlement is a question of law. - 339
9. It seems the best opinion, that no man without a warrant can claim land by a Settlement made by an agent; it being the intention of the law, that the claimant by settlement should himself reside on the land. 340
10. There can be no title by Settlement without an actual residence on the land. - 342

SLAVE.

See Evidence, 29, 31.—Master and Servant.

A Slave, brought from another state into the counties of Westmoreland and Washington, after 23d September, 1780, by a man not then an inhabitant of those counties, is, as if brought into any other part of the state after 1st March, 1780, free. - - 284—90

STIPULATION.

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See Evidence, 19.—Settlement, 4, 5, 6, 7.—Warrant for Land, 3.

1. The act of 8th April, 1785, makes void a Survey made before a warrant. - - 53-4
2. But it seems this act extends not to any land out of the *New Purchase*. - - 54
3. A Survey cannot be given in evidence, unless a warrant authorising it is produced. - - 130-1
4. If a survey be made on land not so well answering the description in the location, and subject to a prior title, it may be waved, and a new Survey made on land answering the description, if no other title intervene; and it lies not in the mouth of another to say, that the owner of the location had, in the mean time, sold it. 250—309
5. If a Survey be made on a warrant or location, a settlement made afterwards on the same land gives no right. 218-19—300
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2. In Trespass for mesne profits an innocent possessor may set off improvements. - - - 215-358
3. If fences, though not what are called *lawful*, be what are called *neighbourly*, and sufficient to keep out cattle not *breachy*; Trespass will lie, for an injury by the cattle of another. - - - 259
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1. Demand and refusal is but evidence of conversion; and, if conversion can be proved otherwise, they need not be proved. - - - 153
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TRUST.

See Warrant for Land, 2.

1. A man having sold land, and received the price, is a Trustee for the buyer, while he holds the title. But, if he afterwards convey to a *bona fide* purchaser for a valuable consideration without notice, the last purchaser will hold the land discharged of the Trust. - - - 349
2. If the subsequent purchaser had notice of the previous sale, he is subject to the Trust. But, if he convey to a *bona fide* purchaser, without notice and for a valuable consideration, the last purchaser will hold discharged of the Trust. - - - 349

USURY.

See Justice of the Peace, 1.

If, besides interest, a certain gain be reserved, it is Usury: but, if it be doubtful whether it may not be a loss, it is not Usury. - - - 125-6

VARIANCE.

See Executor, 1, 2.

1. In a forgery, writing *Randole* for *Randall*, is the same for all purposes of deception. - - - 45

2. Indictment for forging a receipt for the use of *H. Brisson*. The receipt produced was for the use of *H. Brisson*. The jury were directed, that they might read it as it was intended, or find a special verdict. No judgment could be given on the special verdict. - 141-2
3. A discharge or acquittal for this Variance will not discharge from another indictment, for the same offence, correcting the Variance. - 142

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Warrant by a justice of the peace not directed to any particular person or officer, will not justify the execution of it. - 376

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See Settlement, 5, 6, 7.—Survey, 1, 2, 5.

1. Warrant taken out by one for the actual settlement of another, before the act of December, 1786, is void. 54
2. The man, who procures and pays for a Warrant or location, has the interest; and the man whose name is used in it, if he have not procured and paid for it, is but a trustee: but, if he sell to a *bona fide* purchaser, for an adequate consideration, the purchaser will hold discharged of the trust. - 300—349
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See Evidence, 1, 2, 3, 7, 13, 16.—Jury, 3.

One of the defendants, against whom circumstances are proved, from which the jury may presume facts amounting to guilt, cannot be sworn as a Witness. 353-4

WRIT OF ERROR.

Writ of Error lies on an order lessening the sum in a judgment; for, though such order be no judgment, it has all the effect of one. - - 121

R E P O R T S.

ERRATA.

Page 87, line 6 from top, read *taylor* instead of *tylor*.
 — 145, — 16 from top, read *plaintiff* — *defendant*.
 — 227, — 18 from bottom, read *disposed* — *diposed*,
 — 377, — 3 from bottom, dele *alone*, where it occurs the second time.

C H A R G E S

TO

Grand Juries

OF THE

COUNTIES OF THE FIFTH CIRCUIT,

IN THE

STATE OF PENNSYLVANIA.

BY ALEXANDER ADDISON,

PRESIDENT OF THE COURTS OF COMMON PLEAS
OF THE FIFTH CIRCUIT.

WASHINGTON:

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COUNTIES OF THE FIFTH CIRCUIT

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OFFICE OF THE CLERK OF THE COURT

P R E F A C E.

TO those, who, after their perusal, may think it requires an apology, to have delivered the following Essays, as Charges to Grand Juries, or now so to publish them, I have nothing to say that would be satisfactory.* Perhaps I have too much flattered myself, in supposing it possible, that they may be useful. They were all written at the times stated. And the man must be wise or insensible indeed, of

* A stronger evidence of a disposition in some men, to monopolize the direction of public opinion, can hardly be given, than the harsh censures which have been propagated on what are called *Political Charges*; nor of the depravity of public opinion, than the approbation with which those censures have been received. While so many set themselves up as political instructors, and, in this capacity, with all the confidence, industry, and zeal of inspired missionaries, preach error and sedition; it would seem hard, if men whose education, habits, and experience, may have qualified them to think justly on public affairs, should be condemned to silence; or, while interposing their sentiments against the torrent of

whom the experience of seven years, in a period of most interesting novelty, varies no sentiment, and corrects no judgment.

delusion, deny them the solemnity of a public station. I flatter myself, that such censures come not from the wisest and best part of the community: and I feel great consolation in the following testimony against them,

Copy of a Letter from General Washington.

Mount Vernon, 4th March, 1799.

SIR,

YOUR favour of the 31st of January, enclosing your Charge to the Grand Juries of the County Courts of the Fifth Circuit of the State of Pennsylvania, at the last December Sessions, has been duly received, and for the enclosure I thank you.

I wish, sincerely, that your good example, in endeavouring to bring the People of these United States more acquainted with the Laws and Principles of their Government, was followed. They only require a proper understanding of these to judge rightly on all great national questions; but unfortunately, infinite more pains is taken to blind them by one description of men, than there is to open their eyes, by the other; which in my opinion, is the source of most of the evils we labour under.

With very great esteem, I am, Sir,

Your most obedient Servant,

GEORGE WASHINGTON.

Alexander Addison, Esq.

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CHARGES.

ERRATA.

Page 137, line 27 from top, read *or* instead of *of*.

— 140, — 30 from top, read *to* ——— *from*.

— 162, — 26 from top, read *arts* ——— *acts*.

— 184, — 10 from top, read *despaired of* ———
despaired.

— 231, — 16 from top, read *ought* ——— *out*.

CHARGE

THE STATE OF NEW YORK
IN SENATE
JANUARY 18, 1881
REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 18, 1880

11

CHARGES, &c.

No. I.

The Judicial Constitution of Pennsylvania.

A CHARGE to a grand jury was, no doubt, introduced, and is properly intended, to assist them in that duty, to which they are called by their country.— *September Sessions, 1791.*
But, as topics of this kind are often abstract or technical, digressions, in strictness foreign to the occasion, are frequently, and not unprofitably indulged. Under this indulgence, I may now be allowed to take a view of the judiciary system, which the constitution of our state has established for the several counties; casting, at the same time, a comparative glance upon that system, the place of which it has taken. And I have the better claim to this allowance, because the subject, interesting in itself, and not altogether unsuitable to the principal purpose, can never again be so properly introduced.

That a people, who have long subsisted in a national state, unassailed by calamity, should voluntarily sit down, and trace back their progress from the first rudiments of society, dissolve every band that held them together, eradicate every prejudice, respectable from time and habit, and by the force of reason, enlightened by the speculations and experience of ages, establish a system of political freedom, is a spectacle reserved for the eighteenth century, reserved for America to set an example of to the nations of the earth, and worth the discovery of a new world to exhibit.

Sept. Sess.
1791.

The late change in the constitution of Pennsylvania, in many respects material, is, in my estimation, so material in none, as in that part of it which relates to the courts of law. The administration of justice being that part of government, which most nearly, and most frequently affects us, the courts, to which it is committed, ought to be so constituted, as, in the highest degree, to deserve our confidence.

That this be attained, their decisions must be impartial, uniform, and according to law.

Law is a science, the right understanding of which requires general knowledge, much study, and close reflection. Without these, it never can be known. And, to know it intimately, will require the labours of half a life.

A court of law, without the knowledge of law, might, had we never known it to exist, have appeared to us an absurdity too glaring, to have place in a free country.— For freedom cannot subsist without law. And law, ignorantly, partially, or uncertainly administered, like every abused constitutional power, is the worst kind of tyranny.

In framing the present constitution of the county courts in this state, both former usage, and a desire of an improved and enlightened administration of justice, had an evident influence; and thus, like a body impelled by two forces, moving in different directions, it has taken the course of neither, but a middle one, as nigh to each, as the force of the other would permit.

To have composed these courts entirely of men, lawyers by profession, would, unless such judges had been few, have appeared a measure too expensive. If they had been few, they might have possessed less confidence, or been liable to more casualties. At all events, this arrangement might have been considered as too great a deviation from the former system: and therefore, to constitute even a professional judge for each county, was not attempted.

To leave the courts unaltered, was liable to so many objections, that no doubt could exist, that some improvement was necessary.

It was easily agreed, that one man, by profession a lawyer, should be allotted to a circuit of several counties,

as president of the courts in all. And it then became a question, whether one man, not a professional lawyer, in each county of the circuit, should be associated with him, and all be judges in every county therein, or whether three or four such men should be associated with him in each county, as judges for that county only. The first method would have been the best. The last was conceived to be the most acceptable; and was accordingly adopted. *Sept. Sess. 1791.*

These judges, besides integrity of heart, and decency of demeanor, are presumed to possess firmness without obstinacy, modesty without flexibility, discretion without timidity, knowledge without conceit, and judgment without presumption. These qualities blended with that skill of the law, which the president is supposed to have acquired, from study and practice in his profession; and which the associate judges are supposed to acquire, by their future attention and experience, may, it is presumed, constitute a tribunal, from which the benefits of a court of justice may be expected, and in which the powers of a county court may be lodged.

These powers are important. Under the former constitution, some justices of the court of quarter sessions and orphans court were not justices of the court of common pleas; and some justices of the court of common pleas were not justices of the court of quarter sessions and orphans court. Now the president, and all the judges of the court of common pleas are, under that name, and by virtue of that appointment, also judges of the court of quarter sessions and orphans court; and, together with the register, judges of the register's court, within their respective counties.*

Further, by the present constitution, certain powers, formerly exercised by the justices of the supreme court only, are now, concurrently with them, vested in the judges of the courts of common pleas. Within their respective counties, they are justices of oyer and terminer, and gaol delivery, and, the president being one, may try capital and other offenders;† and they have also, therein, the like powers with the judges of the supreme

* *Constitution, Art. v. § 7.*—† *Art. v. § 5.*

THE JUDICIAL CONSTITUTION

Sept. Sess. court, to issue writs of *certiorari* to the justices of the
 1791. peace, and to cause their proceedings to be brought before them, and the like right and justice to be done.*

A new provision, important to liberty, is made by this constitution, that no commission of *oyer* and *terminer*, or *gaol delivery*, shall be issued.† In other countries, there have been instances, where the government, having marked out some persons as objects of revenge, and deeming the judges in standing commission unfit tools of its malice, has issued special commissions of *oyer* and *terminer*, or *gaol delivery*, to individuals, singled out for the purpose, who, after serving the present turn of oppression, might shrink from the public notice, and be obscured in the mass of the people. It is not necessary to trace the records of the Bastile or the Inquisition for victims of legal tyranny: the history of England itself, so justly famed for the freedom of its laws, will afford examples. Next to a trial by Jury, it is essential, that the judges who are to decide on the life or liberty of any citizen, be known, and be appointed for all alike. This is secured to the citizens of this state; for no commission of *oyer* and *terminer*, or *gaol delivery* issuing, and the judges of the supreme and county courts having the authority of such commissions, by virtue of their offices; no man can be punished or condemned, but by judges, who have a judicial character to support, and an office to lose.

The judges of the courts of common pleas, being judges in appeals, in actions of debt or demand not exceeding ten pounds, the individual jurisdiction of deciding such actions is left, as before, with the justices of the peace. But all powers of a justice of the peace, so far as relates to criminal matters, are given to the presidents, within their respective circuits, and to the judges within their respective counties.‡

Deriving their appointment from the governor,|| not as before, from the people; and holding their commissions during good behaviour, they are freed from all bias or partiality, arising from motives either of gratitude for the past, or fear for a future election. And

* *Const. Art. VIII. § 8.* † *Art. IX. § 15.* ‡ *Art. v. § 9.* || *Art. v. § 4.*

being thus called forth, by the voice of the whole commonwealth, not of any particular part of it, they are equally related to all.

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It is not, I believe, saying too much for the county courts established by our constitution, to pronounce, that they exhibited the best system of county judiciary then existing in the Union; and it is known, that they have already served as a model for a similar system, in a neighbouring and very respectable sister state.*

That these courts are composed of a fixed and small number,† is a matter of greater consequence, than may at first appear. There is a delay attending the deliberations of many, and a difficulty in reconciling their various sentiments, and bringing them to unite in one point. But delay and difficulty are not the only inconveniencies. The business committed to many, is often done in a careless and slovenly manner. A trite maxim, that "what is the business of every man, becomes the business of no man," has seldom been better verified, than in our county courts. The judges being ten, twelve, or twenty in number, any three of whom could constitute a court; being appointed only for seven years; and receiving no compensation for their attendance in court; each thought himself at liberty, to pursue his own amusement or other avocation; because there was a sufficient number, without him, to compose a court. If a court was composed, those, who, by accident, were on duty, thought themselves intitled to a similar relief; and laid hold of the first opportunity, and perhaps not a seasonable one, to enjoy that relief. Thus they acquired not that skill, which might have resulted from a constant attendance; the business was delayed, by each endeavouring to throw it on another; and, strange as it may seem, it sometimes happened, that, after several sets of justices at the hearing of a cause, it was, at last, decided by those, not one of whom had heard the whole.

These faults, egregious as they are, must be imputed to the laws, rather than to the men: for they were the natural consequences of the constitution of our courts. The courts consisted of too many members, and the

* *Maryland.*

† *Const. Art. v. § 4.*

Sept. Sess. members were appointed for a limited time, and received no reward. Thus, no individual feeling any interest or peculiar obligation, the sense of duty was not so distinct and keen, as to have a regular, certain, and just operation; though in some (and it will be remembered to their honour) under all their discouragements, it had.

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It is the duty of every state to fill the offices of government with men qualified for the necessary duties.— If those duties require time, talents, or labour, it is neither just nor reasonable, to expect, that they should be fulfilled, without an adequate compensation. A general service every man owes to the public. A particular service to the public, without wages, no man is bound to bestow. It is therefore the duty of the government to allot to every man, who is called into such public service, a compensation adequate to that service, which he is called to perform. If this be a duty of the government, it must be performed, though its performance may occasion expence.

Each state, whether of nature or civil society, has its advantages and disadvantages. In a state of civil society, courts of justice are necessary. Being not only necessary, but important, they ought to be made as perfect as possible; and, to attain this degree of perfection, and ensure a regular and proper exercise of their powers, expence is necessary.

The county courts having immediate and important influence upon our interests, it was thought, that every obligation and inducement ought to be laid upon the judges, to do their duty, and to do it well. And this, it was presumed by the present constitution, would be effected, by reducing them to a small and fixed number,* giving them commissions during good behaviour,† and allowing them salaries.‡

The judges now allotted to every court are not more, perhaps, than are supposed necessary, to ensure confidence in their decisions. They are so few, that they can be easily, distinctly, and generally known, and that the absence of any one will be instantly observed. Each of them will have reason to suppose, that his presence

* *Const. Art. v. § 4.* † *Art. v. § 2.* ‡ *Ib. and 3d St. L. 88.*

may be necessary at court; and, being there, will be ashamed to be absent from his place. Thus every one will feel himself a necessary member of the court, and be prompted to do his duty. *Sept. Sess. 1791.*

But every one will be prompted also to do it well.— For seeing no other end of their commissions, but the end of their lives; and being no longer bound to bestow their time and service, for the benefit of the public, without a compensation; but receiving salaries, to compensate for their time and labour devoted to the community; their office becomes a calling or occupation, and, as such, their particular attention to its duties is expected and required; and not immediate attention only, but a competent preparation, by study and reflection, for an intelligent discussion, and right decision of the questions which may come before them.

These questions being, as we have seen, so greatly enlarged, in number and importance, beyond the subjects which composed the jurisdiction of the former county courts; and a new arrangement and reformation of the whole system being intended; a necessity arose of allowing salaries to the judges of those courts so reformed; and these salaries will bring upon the state an annual expence of about five thousand pounds.

Such a sum, expended on an article, which, before cost us nothing, may appear large. But let it be remembered, that, divided among the taxable inhabitants, it will little exceed the proportion of a shilling to each; and that it is small, in comparison to what is paid in some other countries. The amount of the salaries of all the judges, both of the supreme and county courts, in Pennsylvania, is nearly eight thousand pounds. The salaries of all the judges in Scotland, amount to forty-two thousand six hundred and sixty-six pounds; and in England, to fifty-eight thousand five hundred pounds, besides those to judges of local jurisdiction there, and not reckoning the judges in chancery, and inferior officers in both kingdoms. Thus the salaries of the judges under the crown of Britain, exclusive of those of Wales, Ireland, and the foreign dominions, exceed an hundred thousand pounds of our money; more than three times as much as the whole expences of our go-

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vernment: while the salaries of the judges of all the courts of Pennsylvania, are not equal to the salary of the chief justice of England alone; and would not fit out a single ship of the lowest rate, of the British navy.

But it is less material what proportion the expence, incurred by the present arrangement of the courts, may bear to that of similar institutions in other countries.— The principal consideration is, that it is, as I have stated, the effect of public duty, and may produce an adequate advantage to those who bear the burden.

It may be doubtful whether it is worse, to have no law, or to have law altogether uncertain. Uncertainty of law makes a miserable slavery. Yet uncertainty was the natural result of the former constitution of our county courts. The justices, continually changing, could not acquire a knowledge of the law; and, therefore, could not make it the rule of their decisions. The same persons seldom sitting together in the same court, and different courts having no mutual communication; their decisions could not operate as precedents, to establish any fixed rule to each other or to themselves. Thus, left like mariners on the ocean, without compass, star, or land-mark, they steered at hazard; and there might be a different law on the same subject, in every county in the state, and in the same county, at different times.

That the law should be the same, and uniformly administered, in all the courts, is of great consequence, to promote its knowledge, prevent dispute, and give equal advantage to all parts of the state. This will be effected, by the division of the state into circuits, consisting each of several counties, of all the courts of which one man is president. The rules of practice and decision in all the courts of each circuit, will thus be as of one court. In this view, we may be allowed to compute only five county courts in the state. It is much easier to introduce and establish an uniformity in five courts, than in twenty-one. From this circumstance, and from the easy method of communication between the presidents of all the circuits, especially when we consider, that they are all judges of the high

court of errors and appeals*; we may expect, that the rules and practice of the law of Pennsylvania will be, every where, the same, certain, and known. Sept. Sess.
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The same principles, rules, and decisions thus governing every court in the state; the judges of the courts of common pleas discharging their duty in a faithful, regular, and intelligent manner, and every day making improvements by study and experience; there will naturally be produced in the suitors an acquiescence in the legality of their decisions, and a confidence in their justice and utility: From this it will follow, that fewer causes will be removed into the supreme court. Thus suitors will gain, by having their causes decided with less costs. The public, also, will gain by it: for, by degrees, courts of *nisi prius*, held by judges of the supreme court, in circuits throughout the state, will be less frequent, or shorter: and being thus lessened, in number or duration, their expence will be reduced.

The great delay in the dispatch of public business, in the former county courts, so much complained of, will be lessened, if not removed. Rules, it may be expected, will be formed to govern legal proceedings, which, being general, uniform, less variable, or fixed, will become known to all, and will guide all. Causes will not be hung up so great a length of time; there will be more certainty of trials. Juries will not attend from Monday till Saturday, without business; but will either find employment, or be discharged. And suitors and witnesses will not attend courts so often and so long, and yet in vain.

It is not easy to conceive how great a saving, to the people of a county, may be made in this way. The expence and loss of time, in preparing for, going to, attending at, and returning from courts, and all to no purpose; this happening to a great number of people, and being repeated too, in a variety of instances; to say nothing of the habits of idleness, dissipation, and debauchery frequently formed in this manner; must constitute a very important positive loss to a county, which it will hereafter be incumbent on the courts seriously to endeavour to lessen or prevent.

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The enlargement of the powers of the county courts will have no little effect on their utility and importance. Their jurisdiction in criminal law is no longer confined to offences of an inferior order, but extends to all crimes, even those of the deepest guilt, and heaviest punishment.

Independent of the dignity thus added to these courts, and the confidence in their decisions, which will flow from it; advantage will result from this increased jurisdiction, both to the unfortunate objects of it, and to the public.

The public will derive benefit from this: for it will lessen the number and expence of courts of *oyer and terminer*, and *gaol delivery*, held by judges of the supreme court, in the several counties. The time and expence of detaining prisoners will thus also be lessened. Punishment, more immediately following the crime, (a point of great importance in criminal jurisprudence,) will appear more closely connected with it: and the sufferer, instead of seeming only an object of compassion, as he seems, in proportion to the interval between his crime and his punishment; becomes, as it is intended that he should be, an example of the fatal effects of guilt, a monument of public justice, and a terror to those that do evil.

The unfortunate objects of this new jurisdiction will also derive benefit from it, whether they be innocent or guilty: for a speedy trial is due to both. Formerly, the person accused of a crime, of which the judges of the supreme court alone had cognizance, though innocent, was, perhaps, confined to a loathsome prison, under the pressure of ignominy, perhaps of want, and the fear of death, for twelve long months or more; before his fame could be cleared, and his fears dispelled by an acquittal. Nor could the guilty prisoner enjoy the melancholy satisfaction of speedily terminating his anxiety, his guilt, and his misery in this world, by the punishment annexed to his crime. But suffering, every day, the anguish of a thousand deaths, he, at last, became habituated to his state of misery, and the reflections of a guilty conscience, and met the final execution of the law, a more impenitent and obdurate sinner, than when his course was first arrested by its power.

Yet it might seem hard, that a man, whose life is at

state, should not have it in his power to rest the decision of his fate, on the discernment and knowledge of the highest tribunal, which the state has established, and the most remote from any suspicion of bias. This power is reserved to him: for under regulations prescribed by law,* he may remove the indictment and proceedings into the supreme court.†

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Another source of advantage, from the present construction of the county courts, is in the power which it gives to the judges, within their respective counties, equal to that of the judges of the supreme court, to issue writs of *certiorari* to the justices of the peace, and to cause their proceedings to be brought before them, and the like right and justice to be done.‡

This authority vests in the county courts all the controul, which the supreme court had by *certiorari*, over the proceedings of justices of the peace within their respective counties. This may be in matters either criminal or civil.

A forcible entry into, or detainer of land, is an offence, which, by certain English statutes,|| extended by construction and practice to this country, might (and yet may) be enquired into, and punished by justices of the peace, sitting out of court. The only method, under the former constitution, of staying or correcting their proceedings, was by *certiorari*, issued from the supreme court, and returnable there. This method was vexatious to the party suffering by the delay which it occasioned, and expensive to both parties.

A justice of the peace may hear and determine actions of debt or demand, not exceeding ten pounds; and his judgment, however irregular or unjust, if not appealed from in six days, or if under forty shillings, was, during the former constitution, conclusive on the parties; unless the proceedings were removed by *certiorari* into the supreme court: a remedy, which, to the distant counties, might be worse than the disease.

Proceedings on forcible entries and detainers, before justices of the peace, are of great consequence; because they may change the possession of land of the highest

* 3 St. L. 94.

† Constitution, Art. v. § 5. ‡ Art. v. § 8.

|| 15 Richard II. c. 2. 8 Henry VI. c. 9. 31 Eliz. c. 11.

21 James c. 15.

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 1791. shillings, may, on account of its comparative magnitude,
 with respect to the estate of the parties, be of as much
 weight to them, as an action of a thousand pounds value
 to others. And one false rule of judgment applied by
 a justice to one action under forty shillings, or ten
 pounds, becomes of consequence, when it is also applied
 to all other actions of the kind, which come before him.
 To leave these cases, therefore, without a remedy, or only
 with one productive of perhaps equal inconvenience,
 was surely improper and unreasonable: it amounted to a
 denial of justice.

Justices of the peace, being called forth, without any
 preparation, from the ordinary occupations of an active
 life, cannot be supposed qualified to decide on nice and
 important questions of law. Having been called forth
 only for the short period of seven years, they had but
 little inducement to endeavour to acquire those qualifi-
 cations necessary for a right discharge of the duties of
 their office. And being left, without any salary, depen-
 dent, for permanent subsistence and advancement in life,
 on their usual occupations, it cannot be supposed, that
 they should bestow that time for the acquisition of those
 qualifications, which would be requisite. These cir-
 cumstances, though now somewhat improved, supposing
 a sufficient number of men of good understanding and
 disposition, to choose from, and a proper choice to be
 made, and making no allowance for those partialities,
 which, in a small neighbourhood, and narrow jurisdic-
 tion, even the best men cannot totally shake off; render
 the execution of this office in all its parts, without many
 errors, not a little difficult. Hence arose the necessity,
 a necessity which, notwithstanding the improved state
 of the office of justice of the peace, may still exist,
 of making the road to relief as short and as easy as
 possible, by an application to the county courts. And
 this, attended with far less delay and expence, is not
 less effectual, than the former application to the su-
 preme court.

As it will thus become the duty of this court to pro-
 tect every citizen, from every erroneous proceeding of
 any justice of the peace, within its jurisdiction; so it will
 it be our duty and our pleasure, to assist and support in

the right exercise of his authority, every gentleman, who steps forward to serve his country in this honourable and useful office. And we expect, in return, that they will concur, mutually and heartily with us, each in his proper sphere, for the preservation of the peace and administration of the justice of Pennsylvania; and for giving full effect to the present distribution of judicial authority, and the improved view of the constitution and laws of our country; that it may appear, that we labour not in vain, and that the trust reposed in us is neither misplaced nor abused. *Sept. Sess.*
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Having a perfect acquaintance of the sentiments and disposition of the gentlemen of the bar, I am enabled to give assurance, that we may rely with full confidence on every aid from them, in accomplishing those essential purposes of our institution; and that no effort of theirs will ever be wanting, to improve the practice and proceedings of the courts, for the attainment of speedy and effectual justice.

Courts have a summary authority over their officers, and it is their duty to exercise it, so as to give to their process and judgments a certain and proper effect.— From sheriffs and coroners, therefore, it will be expected and required, that every writ and order of this court shall be executed with precision, readiness, and impartiality; that money shall never be retained, nor be diverted from its regular course; and that no opportunity furnished by their office, shall ever be perverted, directly or indirectly, to the purposes of speculation. No private passion must mingle with the executive, any more than with the judicial part of public justice. This is especially to be expected from sheriffs, no longer left, from any apprehension of their future election, under the temptation of tampering with their duty. Being secure, by one appointment, for all the time which they are permitted to serve; the freedom of election, and independence of the officer, are happily provided for.

Constables are appointed by this court, and, by such appointment, they become the proper officers for the execution of process issued by justices of the peace, in actions of debt and demand not exceeding ten pounds. That great abuses have been committed in their execution of this process, by collusion with defendants, or

Sept. Sess. with plaintiffs, and delaying the recovery of money, or recovering it in an oppressive manner, and by corruptly retaining it in their own hands, after it has been recovered, is generally known, and greatly complained of. It is also known, that justices of the peace, from a suspicion of their want of power, or from other causes, have neglected or declined to take effectual measures for correcting these abuses. But, if they should not, and complaint should be made against a constable to this court; shall we also be silent? I trust not: and I have no doubt, that we, also, have full authority, to redress this enormous and growing evil. Without the appointment of this court, constables could not be such, and so could have no power to execute process of a justice of the peace. Having the power of appointment, it is our duty to furnish justices of the peace with constables that will execute their process faithfully and skilfully. They being officers of this court, we are, in some measure, responsible for all their official conduct; and bound to examine and correct it. These circumstances establish a connection between this court and constables, acting as officers of justices of the peace, even in civil process; and render it our duty to correct their faults, in this part of their duty, as well as in every other part of it.*

Of those who may be summoned as jurors, either on the pannel of the grand, or the traverse jury, a constant and regular attendance, and a proper discharge of the duties required of them, will be expected. If, in these respects, they should be deficient, it will behove the courts to interpose that authority, with which the law has intrusted them.

This service may be considered as a privilege and a duty. It is a privilege, being a portion of the judicial authority of the state, reserved to be exercised by the people, of whom a jury may be termed an abstract or committee. It is a privilege also, as affording an opportunity of acquiring some acquaintance with the laws of our country; a competent knowledge of which, every citizen, especially in a democratic republic, ought to possess. The exercise of this privilege, like every

* See the case of an attorney of C. B. 2, Wils. 382, of B. R. 3, T. Rep. 275, 1 Str. 621.

general privilege of a citizen, is a duty, which every citizen, qualified for the exercise of it, owes to the public; and which requires a sacrifice of both time and attention. It is a duty also, which he owes to the individuals, whose causes may come before him: for they have a right to a trial by that jury, which the laws have prescribed; and the absence of any one juror is an abridgment of that right, and a violation of that trial, the purity of which is essential to our liberty. Whether it be considered as a duty or a privilege, both the burden and the benefit ought to be equally distributed. The state has a right to require of every citizen, that he attain all the knowledge, which his situation will permit him to attain, and that he contribute a due proportion of his service. And every citizen has a right to require of the state, that no more than a just proportion of public service be laid upon him. And the law having provided for these ends,* every citizen qualified must be called out in his turn; and, when called out, will, we expect, obey his summons with strict punctuality, and perform his service with impartial accuracy.

If all concerned in the administration of justice shall thus be induced and constrained to unite in an upright, intelligent, and steady discharge of their respective duties; we may expect from the present construction of courts of justice, and distribution of judicial authority, essential service and profit to the state.

That you, gentlemen, who are selected as the first grand jury, for this county, under this new arrangement, will, in your place, contribute to this important purpose, by bringing every offender to light, I have no doubt. And that you will do this, with impartiality, influenced neither by fear, favour, nor affection, your good sense and regard to justice will direct, and the duty and independence of your station will require.

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* 2 St. L. 266.

No. II.

*December
Sessions,
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Principles and Forms of Public Prosecutions.

MAN, in his solitary state, is a kind of rational animal, but little distinguished from the beasts of the forest. It is in society that he acquires that knowledge, refinement, and virtue, in which the dignity of his nature consists, and by which he is exalted above the earth, assimilated to the divine nature, and prepared for those regions, for which his maker designed him.

Unfortunately, it is not knowledge and virtue only, which he learns in society: his wisdom degenerates to craft, his refinement to dissimulation, and his virtue to selfishness. Prone to evil, and prompted by passion, a sense of duty, or a fear of future and invisible punishment, cannot restrain him from mischief: he must be bound by force, and feel instant revenge.

But associations or states being formed chiefly to preserve themselves from external violence; in the infancy of states, and in the rude stages of society, offences, committed by one member of the community against another, were probably left, for redress or recompence, to the strength or cunning of the person offended, and those whom he could associate in his cause. If the offended person and his friends were silent, the public was not considered as having any cause of complaint; or if they sought revenge, it was permitted, as a thing of course, prosecuted in their own manner, and abandoned at their will.

By degrees, this would appear improper and dangerous. An angry injured man will seldom stop at the just measure of revenge; and calamity would be perpetuated by the very means taken to punish or prevent it. Only one half of the benefits of society would appear to have been obtained, if it guarded but against the external ruffian, while it fostered one, not less dangerous, in its bosom. The offender might elude the search, or overcome the force of the private avenger; and a necessity would arise, of stretching out the public arm, in aid of justice.

But, lest public vengeance should too hastily interfere, certain solemnities must be adopted, to mark out the victim, on which it should fall. Courts of justice were instituted; where, and where only, the injured man was to seek redress. Laws were framed, to designate the actions, which the public would resent; and regulate the punishment, which the offender should receive. In doing this, the distinction between crimes and injuries would be at first obscure; when attempted to be ascertained, would be long variable; and the same action would, at one time, be ranked as a crime, at another, as only an injury.

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Even when the state had thus determined, that vengeance belonged to itself, and was to be repaid by it alone; still its power was exerted only to recompense the damage, or gratify the revenge of the person injured: and the criminal was permitted to purchase the friendship, or soothe the malice, of his antagonist, on certain terms, or as he best could.

But, as soon as an idea so refined could exist and prevail, that the whole community made, as it were, one person; all the qualities and passions of a person would naturally be ascribed to it. It would have its fear, to prevent danger; its honour, to feel indignity; its revenge, to inflict punishment. And, it being the duty of the whole, to preserve every member from harm, an injury to any individual would be resented and punished, as an injury to the person of the state.

The system now became totally inverted: beginning with private compensation, without any idea of public punishment; it ended in public punishment, without leaving any room for private compensation.

Perhaps receding back to a mean between those extremes, in some cases, where compensation was possible, and the damage susceptible of estimate*, the laws fixed on a rational rule; and, without relinquishing public punishment, decreed redress to the individual injured. Yet even here, the leading idea was the offence against the state. And it is a characteristic of a crime, that it is the state, which is offended; the state, which prosecutes for revenge; and the state, whose honour is to be

* *Robbery, larceny, &c.*

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repaired. Though, in some countries, as in Scotland, the individual chiefly injured is suffered to join, with the state, in the prosecution; and, in some crimes, as in murder, is suffered to prosecute criminally alone, by appeal.

One refinement more was necessary, to complete the system. When private revenge was prohibited, by law, to interfere, it might still work under colour of law, and the name of the state be assumed, not for public good, but for private malice. To prevent this, various means have been adopted. Sometimes an oath, called the oath of calumny, has been imposed on the prosecutor, by which he swears, that he prosecutes, for the sake of justice. To this has sometimes been added, that, if the party accused be acquitted, his accuser shall suffer the same punishment, which would have been inflicted on the accused, if he had been convicted.

Another check on malice has been the appointment of a public accuser; an officer, whose duty it was, and who alone had authority, to institute and manage prosecutions for offences against the state.

But the noblest check of malice, and the most effectual of all, is a grand jury; whose duty it is, to take cognizance of all offences; and without whose sanction, no criminal can be brought to justice, an institution, which is well calculated to preserve the innocent individual from oppression, either from the power of the state, or the malice of a fellow citizen.

You, gentlemen, who are now called to a duty so important, a service so honourable, and an office so essential to the liberty of your country; may see the object of your present attention. You are now called forth, to preserve your fellow citizens from all accusations malicious and unjust, and preserve the laws of your country from all violation. Wherever there is a false charge, cover it with your disapprobation.—Wherever there is a true one, bring it to light. The more essential to liberty the institution of a grand jury is, the more zealous ought you to be, to preserve its functions. For the sure way to destroy, is to pervert it. If you will not give legal scope to the resentment of injury, you destroy the ends of civil society, and bring us back to the state of nature. If you interpose the weight of

public authority, on every light or false grounds, you bring the institution into contempt and averſion; and, by puniſhing one innocent perſon, lay a temptation for the acquittal of many guilty. *Det. Seſſ. 1791.*

You are not now to learn, that offences, the peculiar ſubjects of your enquiry, are ſuppoſed to be committed againſt the ſtate; which, on the principles of civil union, is bound to protect all its members from injury.

When the offence, or unlawful act, is of a general nature, ſo as to manifeſt a forcible oppoſition to government itſelf, and not an individual citizen; as to pull down *all* incloſures, deſtroy *all* brothels, reſiſt *all* proceſs, and abuſe *all* officers; what is this but treaſon, levying war againſt the ſtate; an uſurpation by individuals of the ſovereign power of redreſſing grievances, making or annulling laws?

When the unlawful act is only of a particular nature, directed againſt an individual, without any deſign to oppoſe government, it is a riot, not treaſon.

Yet a riot is an heinous offence, and all tumultuous proceedings by perſons fewer in number, than are neceſſary to conſtitute a riot, are groſs miſdemeanors, productive of increaſing miſchief, diſgraceful to ſociety, and pernicious to liberty. If one man, or one corner of a country, be at liberty to redreſs a grievance by violence; every man, and every corner of the country, muſt have the ſame liberty; and every man be free to judge, what is a grievance, and how it is to be redreſſed. One part of the people will take up arms, for one cauſe; another, for another. Others will arm, to defend the very things, which the firſt attack. No man's life or property is ſafe, if any man may decide, whether he ſhall poſſeſs them or not. And inſtead of free citizens, we ſhall become bands of ſavages, and mobs of ruſſians.

To quell theſe ſcenes of riot, even wiſe moderate and good men will think it neceſſary to ſtrengthen the hands of government with new powers, which will naturally increaſe, till the ſilken cord of liberty be converted to a yoke of iron.

This is the natural iſſue of tumults, where liberty is uſed as a cloak of maliciouſneſs. There can be no liberty, but where the laws govern every man. The

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moment that the laws are defeated, the government is destroyed. And the man who forcibly resists the laws, lays the foundation of the ruin, either of himself, or of the government. His opposition, and the existence of the government are incompatible; and he brings the matter to this plain point, whether the government or he shall fall. In the decision of this issue, he must expect to have all the wise and good against him; for none such will desire to preserve their lives, longer than the time comes, when they must owe their preservation to any thing else, than the laws of their country.

The application of these sentiments is obvious to you all. They are drawn from me by the regret, with which I have heard of some late riotous proceedings in this county,* and the mode of expressing resentment by tar and feathers; which however natural in the convulsions of a revolution, is altogether inconsistent with a settled government. They are delivered to you, with a perfect conviction of their truth, a sincere regard for the welfare of this country, and a wish, that they be considered as not so much the denunciations of a judge, as the faithful counsels of a friend.

** In Washington county first, and afterwards in Allegheny, Westmoreland, and Fayette, there were riots against persons engaged, or supposed to be engaged, in the collection of the excise.*

No. III.

Principles, Nature, and Ends of Public Punishments.

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1792.

HUMAN conduct is under the influence of two very strong passions, hope and fear. Without objects to affect these, man would be a listless being, and life would hardly deserve its name. Religion would be defrauded of its most powerful motives, and government disarmed of all its control. This is the mystery of faith, and the means of obedience. By these the human will is to be bent, and man's actions governed.

Some have disputed whether human laws reward *March Seff.* merit; but all agree, that they punish crimes. They 1792. do this by their command over those things which are the objects of fear, as poverty, disgrace, bodily pain, or death.

That justice should be satisfied, by inflicting the same quantity of pain upon the guilty person, which his crime has occasioned to the person injured by him, is rather a fictitious, than a just sentiment. It has perhaps given birth to the law of retaliation, which demands eye for eye, tooth for tooth, and life for life.* But however natural or proper, as a regulation of justice, it does not explain the final cause of punishments. Even on the ground of retribution, it may often be exceptionable, as ministering neither the same sorrow to the offender, nor any compensation to the person injured.

The rational end of punishments is the prevention of crimes. This is evidently the end of laws; and punishments are only means of making laws effectual. The prevention of crimes may be aimed at in two ways; by the effect which the punishments are intended to have on the minds of others, and by their effect on the criminal himself.

Some punishments are intended to operate only on the minds of others, by way of example. Such are all capital punishments, which leaving no space, either for repentance or new guilt, deprive the offender, at once, of the power of doing either good or evil.

Exile, banishment, or transportation has an imperfect, and but an imperfect influence this way, or either way, while it seems to embrace both. Its object cannot fairly be the reformation of the criminal; since it cuts him off from the society, as a member altogether useless or dangerous. Nor can it fairly be an example to others; since it removes him from the view of those, who have been witnesses of his crime, and are to be warned by his punishment. Yet that separation from friends, family, and home, which is effected in their presence, seems to have a strong tendency, as an example; and the opportunity, which it gives of rising to a

* *Exod. xxi. 23.*

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new character, in a strange country, seems to be a strong excitement to reformation.

Pain is to all men, in all circumstances, an object of terror, and therefore a sure mean of punishment. For offences of great turpitude, which indicate a baseness of mind insensible of shame; for offences of evil or dangerous tendency, especially where the temptation is love of pleasure; bodily pain is, both for example and reformation, a proper punishment. It operates by example, from its severity, its duration, and visible marks. It operates by reformation, from all these circumstances, counter balancing the temptations to guilt.

To some minds, disgrace is more intolerable than pain. To such, therefore, disgrace may be a proper punishment; and to others, of similar feelings, an example. But the law ought to take care, that it have this punishment at command. To condemn to the pillory a man convicted of a popular offence, is to reward him with the joys of martyrdom, or the honours of a triumph. And to punish a base mind with disgrace, is to torture a dead body.

For frauds, extortion, usury, and other offences, to which men are prompted by an inordinate love of money, pecuniary loss, by way of mulct or fine is a punishment of peculiar propriety. As such offences are symptoms of a sordid avarice, to which money is the greatest joy, and the loss of it the greatest evil, the offender is punished in his tenderest part; and his punishment can, at the same time operate, not only as a check to himself, and an example to others, but also as a compensation to the person injured by his offence.

Systems of punishment have been formed on two different principles. According to one, capital punishments have been annexed to few crimes, but certainly inflicted. Some have doubted whether life ought ever to be taken away, for offences against property. This doubt must have arisen from the imperfection of punishments, merely as a satisfaction of justice. Even in this view, it will be acknowledged, that punishments ought to be in proportion to crimes; and that the degree of guilt, and therefore of punishment of any crime, is to be measured, not merely from its immediate nature, but from that, and its usual effects. Such an adjustment

we should expect, from perfect justice, and perfect *March Seff.* knowledge, that no crime should escape, lest crimes 1792 should multiply by indulgence; and that the danger of committing them should be increased, according to their mischief. But though divine perfection, in the measure of its retributions, regards only the degree of guilt, man's knowledge is limited, and his retributions imperfect. In our estimate of punishments, considering them not only as satisfactions of justice, but as means of preventing crimes; we must compute not only the degree of guilt, but the facility of its commission. Many crimes escape notice; and human frailty must compensate its want of penetration into secret guilt, by the severity of its punishment, when detected; that the degree of punishment may counterbalance the chance of escape. Hence it becomes necessary, that the degree of punishment be in proportion, not to the greatness of the crime only, but to that, and the facility of its commission. And distinctions in punishment, between principals in the first, and in the second degree, exciting different degrees of terror, might raise a difficulty in the contrivers or aiders of crimes, to find agents or instruments.

The true rule, then, is, that punishment ought to be so severe, as to be exemplary, and sufficiently to counterbalance the temptation to crimes; that, if possible, it should be of such a nature, as to be some compensation to the community, and the party injured, by the crime; and that it should tend to the reformation of the criminal, and never cut him off from the society, till he appear useless and dangerous to it. Exile and death, depriving the society of all further service from the suffering member, ought to be the last remedies for guilt, and never be administered, while there is any reasonable prospect, that the offender may be made either useful or harmless to the community. A limb is not to be lopt off, for every sore; and he is an unskilful surgeon, who uses no other remedy but amputation.

By a system founded on another principle, capital punishments have been denounced against many crimes, with an expectation, that the power of pardoning will be extended to many instances of each. There are few crimes of the same name, which do not admit of many

March Sess. degrees of guilt. Like that gradation, which pervades
 1792. nature, the lowest degree of one crime nearly touches
 the highest of an inferior order, as the highest does
 the lowest of a superior. To inflict the same punishment
 on every degree of each crime, would be unequal;
 to ascertain and describe the different degrees, and fix
 a punishment proper for each, would be difficult or impossible.
 The same punishment is, therefore, denounced against all degrees of the same crime; but as this, from the different circumstances attending them, will establish unjust retributions; a power of pardoning is interposed, at the discretion of the chief magistrate. He, who, of all the community is presumed the most remote from private influence, sits again in judgment on the criminal, and decides, whether that degree of his crime, of which he hath been convicted, be pardonable or not. In this manner the fear of death, of all fears the greatest that man can inspire, is made to operate against the greatest number of crimes, with the least injustice; and yet that indulgence, necessary to render the punishment more equal, is no encouragement to crimes; for the chance of escape, by pardon, is too precarious a defence against this fear.

One may indulge a comparison between this provision, for the pardon of criminals of certain degrees in every offence, and that of cities of refuge for manslayers among the Jews. Among that people, all homicides were punishable with death; but under these regulations, Where the homicide was undesigned or casual, the slayer might flee to a city of refuge, and there remain in safety, till the death of the high priest, when he might return home under the protection of the law.* But if, before he reached a city of refuge, the avenger of blood overtook him; or afterwards, and before the death of the high priest, found him without the city; and killed him; the avenger was not guilty of blood.† But to a man, who purposely, and from hatred, killed another, the cities of refuge, or even the altar of God, afforded no protection. For him, no ransom was to be admitted; he was to be taken from the altar, or, if he had fled to

* *Num.* xxxv. 11, 28. *Deut.* xix 24. *Job.* xx. 3, 6.

† *Deut.* xix. 6. *Num.* xxxv. 26, 28.

a city of refuge, the elders of his city were to send and fetch him thence, and deliver him into the hands of the avenger of blood, that he might die.* *March Sess.*
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The system of punishments, like every other part of the administration of justice, and every part of civil polity, receives its improvement by degrees and length of time. It was not till society had made considerable progress, and long after they had become a public duty, that judicial institutions were a public burden. The sovereign, who, to his wealth, owes his authority, must out of that wealth, administer it. But his administration is not therefore free. The man who comes to claim his interposition, and obtain justice, must not expect to rouse the despot from his couch, without a present in his hand. According to the value of the present, are the exertions of the prince, to procure redress. And the unhappy wretch, whose offence has disturbed the sloth, or interrupted the pleasures of his lord, must compensate, not only the damage of his neighbour, but the molestation of his judge. He must gratify his avarice by money, or his revenge by suffering. The less any country is removed from this state, the severer are its punishments; and, in this state, the severest of all.

But when the private revenues of the sovereign, by gradual dilapidations, are no longer adequate to the exercise of his authority; and his power, parcelled out in different branches, is delegated to ministers, for whose maintenance taxes are established; the administration of justice, of which the prince is personally relieved, becomes a separate employment, the labour of which is compensated out of the general stock, and not from the fortune, nor by the sufferings of the criminal. The trouble of administering justice forms no immediate part of the estimate of the punishment due to the offender. One temptation to its severity is withdrawn. And punishments become more gentle, when they are inflicted, not by passion, but by reason; and estimated by the damage of the individual injured, and the disturbance of the society; not by the anger of the judge.

The progress of knowledge, and the admission of the

* Num. xxxv. 31, 32. Exod. xxi. 12, 14. Deut. xix. 11, 12.

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people into a share of the burden, and therefore of the power of government, which contribute to the moderation of punishments, contributing also to the increase of liberty; it may be laid down, that in the freest governments, the punishments will be the most moderate. In despotic countries, the laws are the will of the tyrant, who is under no inducement, from a sense of his own subjection to his laws, to make them lenient. In free countries, the laws are the will of the people, to whom a sense of subjection is a constant motive to lenity. It may require also sanctions less severe, to secure the obedience of the people to their own will, than to the will of their tyrant. May we not therefore wonder, that the country in Europe, which first exhibited the example of abolition of capital punishments, is the most savage, and most enslaved. But let it be remembered, that while Elizabeth, the late empress of Russia, prohibited all punishments by death,* she had the desarts of Siberia, whither to banish the victims of her justice: and religions which inculcate the belief of a purgatory, need less retain the terrors of Hell for sanctions of morality.

In England, besides the prerogative of pardon, what is called the benefit of clergy, or relieving a criminal from capital punishment, if he could read, being extended to, or withdrawn from, different degrees of guilt, regulated the unequal denunciation of death to a great variety of crimes very different in their natures. The statutes which introduced into their law transportation, as a punishment for those, whom it was neither thought proper to kill, nor to retain longer in that division of the empire, greatly softened the rigour of punishments. After the troubles, which separated this country from Britain, had rendered the usual mode of transportation difficult, an act of parliament substituted, in its stead, confinement to hard labour on the river Thames.— Still, however, notwithstanding the boasted liberty and knowledge of that kingdom, their punishments too much favoured of the rude barbarity of those ages, in which the source of all laws and government is obscured. At

* The punishment of the Knout remained, and is frequently fatal in its consequences.

last, Mr. Howard, deservedly styled the "Philanthropic Howard," who, of all men, seems alone to merit that address of the author of our religion, "I was in prison, and you came in to me;" who travelled through the world, to visit not the riches of cities, nor the grandeur of courts, but the miseries of gaols; unveiled the sorrows of those doleful abodes of misfortune and guilt, and the salutary purposes to which they might be improved; excited reflection, and inspired the idea of mixing mercy with punishment, and introducing humanity and hope into the dungeons of guilt and despair. The punishment of criminals became a subject of philosophical investigation. Acts of parliament were made, and societies were formed, to alleviate the miseries of prisons, to cleanse them from filth and disease, and convert even those hopeless mansions into scenes of industry and useful labour.*

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To so important an improvement in criminal jurisprudence, the free and intelligent commonwealth of Pennsylvania could not long be indifferent. Eagerly embracing a scheme, founded on the truly parental and benevolent principle, that the reformation of the criminal, restoring him to a new mind, a new state, and a new character, is the true end of punishment; she carried it to a degree of practice and improvement unknown to other nations; and which an equal distribution of property, certain success of honest industry, infrequency and moderation in crimes, freedom of government, importance of the people, and mildness of their manners, rendered her peculiarly qualified to exhibit.

An act passed in 1786, to reform the penal laws of this state,† reduced the crimes punishable by death to a small number, and, for other crimes, decreed a temporary servitude; that the criminal, in a state of subjection and labour, might form resolutions of repentance,

* Labour at the gallies, mines. &c. had long been used, as a punishment, not as a mean of reformation. But, since writing the above, I have seen in the life of Mr. Howard, that confinement for reformation, had before his introduction of it into England, been used on the continent, in Germany, Switzerland, and especially in Holland; and that his system was the result of his observations in those places.

† 15th of September.

March Sess. and habits of industry. To this was added another, 1792. in 1789,* which enjoined the commissioners of the several counties, to cause to be set apart in their several county gaols, and gaol-yards, suitable apartments, for the accommodation of persons confined for debt, or on civil process, or as witnesses in criminal prosecutions; where such persons could be kept altogether unmixed with prisoners accused or convicted of felony. And both these acts were superseded, with a view to farther improvement, by another act passed in 1790,† embracing the same objects, adding solitude to labour, and particularly regulating the management of prisoners. The exertions of individuals seconded the views of the legislature. A society, similar to those in England, was formed in Philadelphia, for alleviating the miseries of public prisons: and, in that city, the experiment seems about to be fairly made, whether cruel, or humane punishments, be the best precautions against crimes.

It is a thing much to be desired, that the experiment could be as well tried, in every part of the state. Were every county provided with a gaol so secure, and so large, that criminals could be confined to labour in separate cells within it; it might perhaps be possible to render their imprisonment not expensive, and their labour advantageous to the community. But, above all, the great end of punishment, the reformation of criminals, might be accomplished: the dreary solitude and silence of their state, while painful to themselves, and exemplary to others, from the dismal apprehensions, which it would naturally inspire, would furnish them with proper reflections on the danger of folly and guilt; and preserve them from that mutual corruption, which the society of each other might produce. Every prison would become a workshop. Their labour might accustom them to honest industry, and the prisoners might come forth, from their confinement, useful members of society.

In England, where labour is cheaper, and provisions dearer, than in this country; the penitentiary-houses, or prisons established on the new system, instead of an expence, have been a saving to the county. In a statement made by Mr. Howard, of the expence and

* 27th of March.

† 5th of April.

earnings of the county gaol in Oxfordshire, for the years *March Sess.* 1786 and 1787, it appears, that, in the year 1786, the whole earnings of the prisoners amounted to one hundred and ninety-eight pounds, one shilling, and eleven pence, sterling, and the whole expence, in clothes, provisions, attendance, and materials, to one hundred and seventy-eight pounds, one shilling, and nine pence, halfpenny; so that there was a saving of twenty pounds, sterling. And, in the year 1787, the saving amounted to one hundred and thirteen pounds, nine shillings, and two pence, sterling. All this was effected, when, at the same time, the managers were enabled, from the share of earnings allowed to the prisoners, to discharge them completely clothed, with some money in their pockets, a good character given them, with a promise, that if, at the end of the year, they bring a certificate, from the master, with whom they shall have worked, of a good and sober character, they shall be further rewarded.*

Effects like these, produced by human laws, bringing good out of evil, so resemble divine benevolence, and creative power, that they may be justly stiled the secondary operations of the Deity.

I turn now to a subject of more melancholy reflection, the enumeration of a few of the offences against the laws of the state, the catalogue of which, the perverse ingenuity of the human mind hath so deplorably extended.

* *Extracts and remarks on the punishment of criminals published by order of the Philadelphia society for alleviating the miseries of public prisons. p. 19.*

No. IV.

Principles of Laws and Crimes.

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1792.

CIVIL government has two objects, the protection of itself, and the protection of the individuals subject to its authority. The government itself, may be injured, by alterations in its principles or its form. Individuals may be injured in their persons, fame, or property. Mutual interests, as we view them, are not so equally balanced, or so consistent, nor are the impulses of benevolence, the dictates of moral duty, or the passion of public spirit, so strong, as to secure these objects without laws and penalties.

The safety of the state or individuals may be affected by foreigners, or by citizens. Private foreigners, while within the bounds of the state, enjoying a temporary protection, owe also a temporary allegiance, are subject to its laws, and punishable, as citizens. Every state ought to do justice on its citizens, for injuries done to another state, or citizens of another state. A refusal of justice by a state on its citizens, for an injury to citizens of another state, ought to be considered as an injury to the state whose citizens are injured. For injuries committed by one independent state to another, there is a code of laws established, by common consent, the law of nations; and the penalty of its infraction is war or reprisals. But it is with a view to its own citizens, chiefly, that the laws of a state are made; to restrain them by penalties, within those bounds, which their interests and passions are ever tempting them to transgress.

Crimes, then, are transgressions of those laws, which a state has established, for the protection of itself, and its citizens. The power of making those laws, is derived from the principles of the government. Certain portions of natural power are surrendered into the hands of certain men, to be used or controuled for the benefit of the whole. Every law is an encroachment on natural liberty. The more laws are multiplied, the more liberty is restrained; the power of government becomes greater and that of individual citizens less. In the formation

of a state, no more power ought to be vested in the government, than is necessary for its free and effectual operation. And, in the operation of the government, no more laws ought to be made, than the protection of itself and its citizens requires : for, as where there is no law, there is no transgression, the multiplication of laws will multiply crimes.

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But though, as laws increase, liberty is diminished, it may not be less, than it ought to be. Liberty is then only less than it ought to be, if more power be given to the government, or more laws be made by it, than its own prosperity, and that of its citizens require.

It is, therefore, not so much from the number of laws, as from the nature of them, that liberty is in danger. It is of the utmost consequence, in the formation of laws, to follow the nature of things ; and, if possible, to forbid only those actions, which in themselves, or their obvious consequences, are injurious to the rights of nature, or the modifications of the society and government. Actions injurious to the rights of nature, and the principles of the government, ought, every where, to be forbidden. But the modifications of different governments and societies, the situation of different countries, the product of their soil, the nature of their manufactures and trade, may occasion the prohibition of some things, naturally lawful ; and forbid, in one country, that which is allowed in another.

The distinction of a *moral* and a *positive* law, of a thing evil in itself, or only evil because it is forbidden, is very common, but where laws are framed on the principles which have been stated, may be justly questioned. Nothing ought to be forbidden, which, either immediately, or in its consequences, is not injurious either to the state or individuals. And every thing, which, either immediately, or in its consequences, is injurious to the state or individuals, must be evil in itself. The opinion also seems questionable, that it is a matter altogether indifferent in conscience, whether a law merely positive and penal, be implicitly obeyed, or its penalty submitted to. The discharge of the duty of a citizen is surely a matter of conscience ; and this duty cannot be discharged, if actions, prohibited by law, be wilfully committed. Due respect for the laws can less easily be preserved, if

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any of them may be contravened, without the idea of criminality. The alternative of obedience or suffering may be extended to all laws whatsoever. The principle seems dangerous, to submit to the consideration of every citizen, whether the law be proper or not; and whether it be indifferent to the state, to receive from its citizens either obedience or penalties. And the idea of transgressing one law, without guilt, may, in time, render familiar the transgression of all.

If laws are unnecessarily multiplied; and actions are forbidden, though neither contrary to the rights of nature, nor to the obvious principles of the government, or modifications of the society; the citizen feels nothing in his own breast suggesting criminality in the action, and has nothing to restrain him, but the positive law, which may be little known, and be transgressed without a struggle. Thus when laws have not their source in the nature of things, the citizens tread continually on traps, or pitfalls; and slip, unawares, into transgressions, crimes, and punishments. Crimes, if it were possible, ought to be known, as it were by intuition, and carry on them a distinguishing mark of abhorrence.

All things wrong in themselves, or of bad consequence are not forbidden by law. Some are left to be restrained by respect for public opinion, or awe of religion. Nor is it of every law, or rule of conduct, that the transgression is deemed a crime. Some transgressions have no penalty annexed to them, nor have they any other consequence, but a compensation for the loss of the injured party. The law seeming only to punish those infractions of that necessary and general confidence, which every citizen must place in every other, remits to a civil remedy those breaches of trust, which result from mutual contract. As their own care may prevent these, the law will not punish them. Analogous to this is the rule, in civil cases, that a man, acting by permission of the law, becomes, if he abuse this permission, a trespasser from the beginning; but not so, if he acted by the permission of the party, for then he is answerable only for the abuse of the authority.

The guilt of crimes is to be estimated, not from their own nature only, but also from their consequences.

An individual action, in itself, of small account, may become too formidable to be overlooked, lest the same indulgence should be claimed for all others of the same kind. And the true question is, what would be the consequence, if *all* actions of this kind were indulged, and should become common.

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A forgery of money or bills may have no other immediate consequence, but a trifling loss, perhaps, to a very rich man; and a trifling gain, perhaps, to a very poor man: it may, in fact, be a charitable application of a sum otherwise useless. But even such forgery must be punished; for the law must be general; and a general indulgence of forgery would produce mutual distrust, the loss of trade, the ruin of agriculture, a failure of the means of subsistence, and, of course, a decay of the human race.

Crimes, which tend to the dissolution of the government, are, of all others, the most heinous. The government being an abstract existence, its dissolution may not so much shock the feelings of the human heart, as the destruction of one man, the object of our senses.— But when we reflect, that government is necessary for the happiness of mankind; that this crime tends to unhinge every society (for society cannot subsist without government) and reduce men to the state of solitary and savage animals; the loss of an individual life will appear small, in comparison to that desolation of the face of nature, of the works of art, and of the human mind, which want of government would produce. The less evils would also be included in this greatest of all. For a government is seldom overturned, without the death of many of its citizens. And, when treasonable purposes are formed, and begun to be put in execution, a gate is opened, at which may rush in a torrent of evils, never in the contemplation of the authors of the calamity, and against which, they are not able to bear up.

Of crimes against citizens, those are the most dangerous, which are committed with force. And the danger is in proportion to the extent of the force, and the importance of the object, against which it is directed. Governments are framed, to place the strong and the weak on perfect equality; to remove that unreasonable

June Sess. advantage, which, in a state of nature, the one has over
 1792. the other ; and to preserve to every man the innocent,
 equal, and free exercise of his own powers, and the
 fruits of his own industry, in peace. If government,
 therefore, cannot restrain force, its end is defeated ;
 there is, in fact, so far, no government ; and men must
 live in perpetual fear of each other, and apprehension
 of unknown dangers.

It may, to some, appear doubtful, whether actual force
 ought not to be reckoned an essential ingredient in a
 crime. Perhaps the Lacedemonians carried this prin-
 ciple the farthest, in their indulgence to theft. Yet
 some frauds, against which common prudence cannot
 save itself ; and to defeat which, that confidence, neces-
 sary for mutual dealings, must be withdrawn ; are, with
 propriety, ranked in the class of crimes.

There are many political reasons, against obstructing
 the current of public opinion. And the same circum-
 stances exist not, in the case of libels, as in the case of
 criminal frauds. These may be practiced, in so secret
 a manner, that only the person injured may be privy to
 them. To leave such frauds, therefore, to redress by
 civil action, might be to indulge them with impunity.
 Libels are of a public nature, and frequently known,
 almost by all, before they are known by the person
 whom they offend. But, notwithstanding these reasons,
 wanton or malicious injuries to the reputation of ano-
 ther, in the way of libel, considered as temptations too
 strong for human frailty to resist ; provocations of
 wrath too powerful for respect of the laws to restrain ;
 and insults likely to be revenged with force, and the
 disturbance of society ; are generally prosecuted and
 punished as public offences. And libels against public
 officers or authority, seducing the citizens from their
 duty, are offences of a dangerous tendency.

No. V.

Duty of a Grand Jury.

STATES usually rising from small beginnings, it is not in their origin, that we are to look for many offices of distinction, and peculiar duty. The citizens, few in number, and within narrow bounds, can, without great inconvenience, assemble, and declare and execute their will. By degrees, these functions become less commodious for the whole body of the people, and they are devolved on select individuals, free from the ordinary engagements of life, and devoted to public service. Even for them, the administration of all the duties of government becomes burdensome; and, both for convenience and safety, it soon becomes necessary, to divide authority into several branches, and allot a separate set of men to each branch. Thus, while officers of one kind are employed in deliberating on the wants and improvements of the state, and declaring its will by laws; other officers are carrying those laws into execution.

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In some states, the progress is more rapid, than in others, and, in different states, the people have retained different portions of power.

On these principles, would I account for the origin of juries. They are the remains of those times, when the whole people of a district assembled, to adjust the controversies, and ascertain the guilt, arising within their limits. Their simple state of living, and modification of property, required few laws. There was little perplexity or refinement in their disputes; and as their penal code was very short and rude, the degree of the demerit of their criminals was easily ascertained. The knowledge of their laws was soon learnt. Not drawn from the speculations of a system, it arose almost from their feelings, and little was wanting, but a sound understanding, and clear discernment, to constitute a judge.

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With men, disputes multiplied ; and with the progress of the arts, the perplexity and refinement of the laws increased. It would have required too much time of every citizen, if the whole district had listened to the examination of every cause. A certain number of them was deemed sufficient ; they attended on those trials, at certain periods, and in rotation ; and every man had his course of public duty ; and private business or relaxation. The increased number, and more complex and refined nature, of the laws, required a length of time, to understand them, which all the citizens could not afford to bestow. The knowledge of them became a particular science ; the acquirement of it a profession by itself ; and none were supposed qualified, to declare what the law was, but those, whose profession it was, to know it. Thus, we may conjecture arose a court, and a jury. The people, trusting to their officers, to declare the law, reserved to themselves the privilege of ascertaining the facts, which, in each man's conduct, was to be measured by that law. A noble privilege ! which cannot be too highly prized, or too purely preserved.

Juries, therefore, being the representatives of the whole people of a county, sitting in judgment on the lives, liberties, fame, and fortunes of their fellow-citizens ; ought, in this high capacity, to feel themselves exalted above every little prejudice, or private interest : with no other motive, but public justice, no other rule, but the laws, they ought to discharge their duty, with that accuracy and care, which an office, on which depends the liberty of their country, can demand, from men of conscience in a public station.

Juries are of two kinds, grand juries, and petit or traverse juries. Grand juries have, in some respects a more general, and, in some respects a more limited province, than traverse juries. Grand juries enquire only into crimes ; but they enquire into all crimes ; and, except in the case of misdemeanor in office, which may be prosecuted by information,* no criminal charge can be brought into a court of justice, in this state, unless it have acquired the sanction of a grand jury. A traverse jury sits on a particular cause, in which the parties have

* *Const. ix. 10.*

reduced the dispute, by their previous pleadings, to one, or a few points. But this cause may be either criminal or civil, and no disputed fact, of either kind, can be determined, without the intervention of a traverse jury.

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Though the precept, for summoning a grand jury, enjoins the sheriff to summon twenty-four, yet no more than twenty-three can be sworn and be of the jury. For, as the agreement of any twelve of the jury, either to find or reject a bill, is conclusive; if two full juries were sworn, a compleat jury of twelve might find a bill to be true, though other twelve of the same jury might reject it as untrue.* There ought to be, at least, thirteen on a grand jury,† and it is seldom thought expedient to swear so few. They must be good and lawful men of the county.

When the grand jury is called and assembled, they are sworn *diligently to enquire, and true presentment make, as well of all such matters, as shall be given them in charge, as of those things, which they may know, of their own knowledge; the commonwealth's counsel, their fellows, and their own, to keep secret; to present no man, for hatred, envy, or malice; and to leave no man unpresented for love, fear, favour, reward, or any hope thereof; but to present all things truly, as they come to their knowledge, according to their understanding.*

This oath seems well contrived, to express, briefly and fully, the duty of a grand jury. It constitutes a good directory, for the discharge of this honourable office, in a proper manner, and deserves the serious and minute attention of every grand juror.

The subjects, on which the deliberations of the grand jury may be exercised, are either *such as are given them in charge, or such as they know of their own knowledge.* The regular way of giving any matter in charge, to a grand jury, is by an accusation drawn up in a certain form, according to the nature of the offence, by the law officer for the prosecution of offences, and given to the grand jury, to be compared with the testimony of the witnesses to support it. This is called an indictment,

* 2 Burr, 1088.
Co. Lit. 155, a. 3 Bac. Abr. 232.

† 2 Hale's P. C. 161, Hargr.

Sept. Sess. or, more strictly speaking, a bill, and when the grand
 1792 jury have found it true, then an indictment.* If the
 grand jury, *of their own knowledge*, or the knowledge
 of any of them, or from the examination of witnesses,
 know of any offence committed in the county, for
 which no indictment is preferred to them, it is their
 duty, either to inform the officer, who prosecutes for
 the state, of the nature of the offence, and desire that
 an indictment for it be laid before them; or, if they
 do not, or if no such indictment be given them, it is
 their duty to give such information of it to the court;
 stating, without any particular form, the facts and cir-
 cumstances, which constitute the offence. This is
 called a presentment. But the person so accused cannot
 be called to answer to this, till it is drawn up in form;
 which it is the duty of the officer for the prosecution to
 do.† The best way to do this, is to draw up a formal
 indictment, and present it to the same jury, for their
 sanction. But if the presentment state all the material
 facts and circumstances, I see no reason why such in-
 dictment, coupled with this presentment of the jury to
 the same effect, should not, without any subsequent
 examination and approbation by a grand jury, be suffi-
 cient, and I believe it would be sufficient, to call on the
 party to answer it.

The accurate interpretation, in its true extent, of
 the *diligent enquiry, and true presentment*, which the
 grand jury is sworn to make, has not been precisely
 agreed on by learned men. Some, considering the ex-
 pence, shame, and suspicion of guilt, brought on the
 person charged by a bill to which a grand jury has
 assented; considering the duty implied in the oath
diligently to enquire and truly to present, by which every
 grand juror is bound; considering that all the witnesses
 to the accusation may be produced, and that none are
 produced by the person accused to contradict the charge;
 and considering that the rejection of a bill by one grand
 jury is not conclusive, but that it may be again sent
 with the same or further testimony to another grand
 jury, which may find or reject it, as their judgment of

* *Rex, vs. Brown.* 1 *Ld. Ray.* 592. *Salk.* 376.

† 2 *Hawk.* 229. 4 *Comm.* 301.

it shall be; are of opinion, that a grand jury ought never to give their assent to any criminal charge, but on such assurance of its truth, as would be sufficient, with a traverse jury, to found a verdict of conviction.*— Others, because the assent of a grand jury, to an indictment or presentment, is only an accusation, and is not a trial; because it fixes no guilt on the accused person, but implies only such suspicion, as deserves further examination, and a future trial of its truth; and because, if absolute verity were required in the first opening of an accusation, many persons, whose guilt would afterwards be manifest, would escape punishment; have asserted, that a grand jury ought to assent to an accusation, on reasonable grounds of probability.† This also may be alledged, that, in countries where the law of England is unknown, there is no grand jury; and prosecutions are instituted, when the executive officers think it expedient. Grand juries are intended only as a check on malice and calumny; to prevent prosecutions, where there is no foundation: but it would be perverting the purpose of grand juries, if, when there is a rational ground of probability, they should stop the ordinary course of trial by a traverse jury.

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Though indictments ought to be framed as near the truth as possible, the grand jury ought to distinguish between truths in matter of fact, and truths in matter of law, which are conclusions drawn from facts; and if the facts are proved, the grand jury ought to find the bill, without taking on them the task of deciding whether the bill has drawn true conclusions in law from those facts; this being a subject of future examination by the court at the trial by the traverse jury, or on a motion in arrest of judgment.

If the grand jury should reject a bill, not because the facts are not proved, but because they do not, in their conception, amount to the crime charged, or because the indictment does not state a crime; this rejection of the bill, excluding the nature of the crime from the eye of the court, excludes the question of law from the examina-

* 2 *Hale's P. C.* 60, 61, 157. 2 *Hawk.* 367.

† 4 *Comm.* 303. 2 *Hale, P. C.* 60, 157.

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tion of that tribunal, whose special province it is; and draws it before a tribunal, whose special province it is to determine facts. On these principles, it is stated,* that, lest offences should be smothered, without due trial, if it be manifest, that one man is killed by another, and a bill of murder is presented to a grand jury, they ought to find the bill for murder, and not for manslaughter or inferior homicide; and, when the party comes on his trial, the whole fact may be examined by the court and the traverse jury. This, it is said, is, in some cases, an advantage to the person accused. For, if a man kill another, excuseably or justifiably, and be indicted, and the grand jury reject the bill, or return the special matter, so that the prisoner is dismissed, he may, nevertheless, many years after, be indicted for murder. But if the grand jury, at the first, had found the bill for murder, and the traverse jury found the special matter, or in case of excuseable or justifiable homicide, not guilty; he can never afterwards be arraigned: perhaps because murder involving in it every inferior kind of killing, a general verdict of not guilty, is a denial of all. However the true ground of this direction to the grand jury, in all cases of homicide, to find a bill for murder, is that malice, the distinguishing criterion of murder, not being a matter of fact, but a conclusion of law from facts, is not to be decided on by a grand jury, but left to an open investigation by the court. And if then it do not appear, the traverse jury will, under the direction of the court, on an indictment for murder, find according to the real case, and the prisoner will be discharged, or receive sentence, according to this finding of the traverse jury.†

Most of the reasons, on which it is contended, that a grand jury should never assent to an accusation, but on absolute evidence of its truth, have led also to a conclusion, that the grand jury, ought to hear witnesses in defence of the accused person. Some of the reasons on the other side apply also in contradiction to this. I need not therefore repeat what has been so recently stated;

* 2 *Hale*, P. C. 60. 157—9. † *vid. Rex, vs. Onby*
2 *Ld. Ray*. 1485. 2 *Str*. 766, *Rex, vs. Huggens*, 2 *Ld. Ray*.
1574. 2 *Str*. 882.

and shall only subjoin some additional arguments, against the admission of this testimony : premising, that though a most respectable judge of the supreme court of the United States, in a charge to the grand jury at a circuit court for Pennsylvania,* supported, with much ability, the admission of testimony for the defendant, before a grand jury ; yet the chief justice of this state,† in several subsequent charges, in his next circuit through some of the counties, directly contradicted this doctrine, and held it totally unsupported in law. So far as authority can decide this question, I believe the weight of authority is against this admission. Antiently it seems to have been the practice, to hear no witnesses in behalf of the prisoner, even before the traverse jury. In the reign of Mary, it appeared necessary, to give express instructions to the judges, to hear witnesses for criminals. Still, being heard unsworn, they were less credited, till act 1 Ann, St. 2 c. 9 directed their examination on oath. A trial before a traverse jury, in criminal cases, seems to have been without issue, and like an inquest, and even yet, in some cases, it retains something of that nature ; for the jury is directed to find things not involved in the issue, as flight, goods, &c.‡ Such being the manner of criminal inquiries, even before a traverse jury, we need not wonder that authority and precedent exclude witnesses in behalf of the accused person, from the hearing of the grand jury.

By the constitution of jury trials, it is said, it is the province of the grand jury to ascertain the probability of an accusation, whether it is founded on malice and falsehood, or not ; and it is clearly the province of the traverse jury to ascertain the truth of this accusation. But if witnesses, brought forward by the accused person, were to be heard in his defence before the grand jury, and they should find the charge true, this would approach so near to a conviction, that the traversing of the indictment afterwards, and the trial by the traverse jury, would appear nugatory, and might be abolished. The finding of the bill would raise such an opinion and presumption of the guilt of the accused person, as must be

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* Judge Wilson.

† C. J. M'Kean.

‡ 4 Bla.

Comm. 359. 2 Str. 775. 4 Burr. 2084—5.

Sept. Sess. a bias in the minds of all men ; and the prisoner could
 1792. not come before the traverse jury with a hope of that
 impartiality in his judges, which the constitution of a
 jury trial supposes him to expect.

Were admission of testimony, in behalf of the person accused, beneficial, it would not always be applied to the most proper objects. The innocent would seldom derive benefit from this provision. With a conscience void of offence, and a mind unsuspicious of accusation, having no previous notice of the charge, he would come forward without witnesses ; and the investigation, concluded at once, would have the effect of a trial, and be a prepossession against him. On the other hand, the man conscious of guilt will watch the moment of his accusation, come forward with witnesses, perhaps the partners of his crime, prepared to save him, by perjury, from the grasp of the law. Long versant in guilt, he will become experienced in the arts of evasion, and have tools constantly prepared, to work his escape from justice.

It belongs to the court only to ascertain what testimony is competent ; to the jury only, to ascertain what testimony is credible. But if witnesses may be produced to the grand jury, by the person accused, there will be no restraint on their admission ;* and, contrary to the principles of our judicial proceedings, the jury will decide on the competency, as well as the credibility, of the witnesses.

Some, entertaining doubts of the propriety of admission of testimony for the defendant, but charmed with the liberality of this measure, and not entirely satisfied with the arguments for the exclusion of this testimony, endeavour to steer a middle course ; and, though they approve not of an indiscriminate admission, will allow, that, in certain cases, and with the approbation of the court, the admission of witnesses in behalf of the defendant, before the grand jury, may be proper. In some cases of difficulty or doubt, the court of king's bench have ordered the evidence to be given to the grand inquest, at the bar, and in the presence of the court,

* *This objection seems to apply also to the manner of receiving witnesses for the state.*

and have then directed the jury how to find the bill.* *Sept. Sess.*
 In such a case, or on a special application, stating the *1792.*
 circumstances to the court, the objections to the ad-
 mission of testimony, in behalf of the defendant before
 the grand jury, are greatly lessened.

In this variety of opinions on an important point, it will become both courts and juries to act with prudence and moderation; and, as the same object, public justice, is pursued by both, like fellow labourers in the same cause, they ought to appeal to each other, for mutual help; and with a decent respect to the opinions of each other, on the topics proper for each to discuss, juries ought to listen to courts in matters of law; and courts to juries in matters of fact. Thus inspiring and possessing mutual confidence, they ought neither to screen any person accused of a crime, whose conduct reasonably appears to demand a public examination; nor, by a rash charge, draw on any innocent man an unmerited imputation of guilt, or unnecessary apprehension of punishment.

Clearly, if, on hearing the witnesses in support of the accusation, it appear unfounded, or if the jury have sufficient knowledge of the incredibility of the witnesses, the bill ought to be rejected. And if there be no absolute proof, especially in an investigation on one side only, the probability or presumption to support the charge ought to be strong. If it be light or rash, no motives of public safety can justify the harrassing of an individual; the common presumption of innocence is a sufficient counterpoise, and you may safely disregard an accusation so lightly supported. For a grand jury ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes, and not rest satisfied merely with remote probabilities.†

By acts of parliament, in the time of Edward VI. in those crimes under the name of treason, there must either be two witnesses, or his own voluntary confession, to convict a prisoner. And these witnesses‡ must swear to the same overt act, or one to one overt act, and another to another, of the same kind of treason.§

* 2 Hale, P. C. 159. † 4 Comm. 303. ‡ 7 W. 3.
 § 4 Comm. 356.

Sept. Sess. Of treason against the United States there must be two witnesses to the same overt act.* In perjury also, to cast the balance against the oath of the defendant, there must be two witnesses.† In all other cases, proof by one witness is sufficient.

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In most public bodies, the opinion of a certain fixed number has the same force, as the opinion of the whole. In some, a majority; in some, a greater portion; in some, nothing less than the whole, can be considered as an expression of their mind. In a traverse jury, the whole must be of one mind. In a grand jury, though unanimity, as in a traverse jury, is not necessary, yet the concurrence of the same number twelve is necessary, to give force to an accusation. If twelve do not agree to find a bill true, it is rejected of course. If twelve do agree to find a bill true, though all the rest disagree, the accusation is as effectual as if the whole jury agreed to find it true.

When a criminal charge is brought before you, if, after impartial and conscientious deliberation, it be the opinion of the whole jury, or of any twelve of you, that there is sufficient reason to call upon the accused person to answer to it; the words, *a true bill*, must be written on the back of the indictment, and, in name of the whole jury, or a competent number of them, be signed by the foreman, with his name, and the word *foreman* added to it. The indictment is then said to be *found*, and the party to stand indicted. But if the grand jury, after due consideration of a bill, and of the testimony to support it, are not of opinion, or if there be not twelve or more of you of opinion, that there is sufficient reason to bring the person accused to a trial; according to the former practice, the word *ignoramus*, that is, we know nothing of it, was written on the back of the indictment; but, now, it is common for the jury to make an absolute assertion, by indorsing the words *not a true bill*, or, (which is the better way) *not found*. And such indorsement, as in the case of a true bill, is subscribed by the foreman, with the addition of *foreman* to his name. All presentments by the grand jury, or

* *Act of Congress, 30th of April, 1790.*

† 4 *Comm.* 357.

any twelve of them, are, in like manner, subscribed by the foreman.* Sept. Sess.
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In making these indorsements and subscriptions, the foreman acts only a ministerial part; and though he be of an opinion different from that which his subscription certifies, he makes no false attestation; for it is not his own opinion which he certifies, but the opinion of a competent jury. He is but the agent of the jury, and like the president or chairman of any society, he may, and he must, sign their acts; and his subscription testifies their assent, not his.

The duty of grand jurors, *to keep secret the commonwealth's counsel, their fellows, and their own*, has been explained as restraining them from finding any indictment or presentment against any of themselves. This cannot be the meaning of the oath. The word *counsel* must mean the same thing, when joined to the word *commonwealth*, as when joined to the words *their fellows, and their own*. According to this explanation therefore, each juror must be understood to swear, that he will neither indict himself, nor any of his fellows, nor the *commonwealth*. But it would be absurd to swear a juror not to indict the commonwealth. This, therefore, cannot be the meaning of the words. A man sworn of the grand jury is doubtless excused from presenting any offence of his own, not by this clause in his oath, but by a maxim of law, and fixed principle of reason, that *no man is obliged to accuse himself*. But this oath does not, nor do I know any principle that does restrain or excuse any member of the grand jury from presenting the offences of his fellows. It is true, there may be some inconvenience in it, from the necessity of excluding from their counsels, on an information against any of themselves, that person against whom it is made. But I see nothing in this oath to prevent it. What then is the meaning of this clause in the oath? It is plainly this, that each juror will keep secret the accusations made to the grand jury, by the officers for the commonwealth, by any of his fellows, or by himself, and all their proceedings thereon, lest the persons accused should receive notice of their accusation, and

Sept. Sess. flee from justice ; and lest a juror, or other informer,
 1792. should be under restraint, in making an accusation, if
 every juror were not solemnly bound to conceal the
 informer.

Of all the means which have been devised, to prevent secrecy and impunity of crimes, calumny and malice in accusers, and injustice and oppression in government, none appear so generous and effectual, as a grand jury : where a number of the most intelligent and upright of the citizens are assembled, from all corners of the county with all the impression of duty on their minds, that a high and important station, and the sacred solemnity of an oath, can impose, with all the interest, which the free enjoyment of their own lives, property, and good name, can inspire, to disclose every offence of which they have knowledge, examine every charge, of which they have information, and, free from all sinister motives, to conduct their deliberations, and deliver their judgment, with a strict and impartial regard to public justice and the public peace.

With what sacred care ought we to preserve inviolate an institution, so essential to public liberty, safety, and peace ! So efficacious of liberty has this institution been esteemed, that an author, respectable for his talents and judgment, does not hesitate to point out the trial by jury as a principle, which, singly, will preserve the British government from that corruption to which all other governments have become a prey, and give to that government an immortality, above the lot of human affairs to attain.*

The preservation of this institution depends upon ourselves : and none, but ourselves, can strip us of this vital spirit of our political frame. Violence cannot tear it from us, for we would defend it with our blood, and lose it only with the last faculty of our lives. Government cannot cheat us of it, for we watch it with a jealousy, too keen for deception. But, gentlemen, an enemy more dangerous and fatal may succeed against it ; we may destroy it ourselves. For I hold it as a maxim of infallible truth, that whenever an institution begins to operate from principles different from those

* 3 *Bla. Comm.* 379.

which set it in motion, and with other objects than it was intended to effect, the way is opened to its ruin. Juries are corrupted and destroyed, when jurors suffer any motives to prevail over truth and the laws, and give their decisions on any other grounds.

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If, instead of truth and the laws, the only constitutional grounds of decision, grand juries will suffer themselves to be influenced by popular opinions, motives of convenience, or favourite prejudices, I repeat my assertion, jury trial is lost, for its principles are corrupted; and our liberty falls with it. If jurors once conceive themselves at liberty to violate its principles, for any reason, they must be the judges of the sufficiency of the reason. Reasons will vary, from the infinite variety of opinions and times. If they be violated, for one reason, to-day, they will be violated, for another reason, to-morrow; till, at last, the violation will become so frequent, and from so many causes, that there will be a precedent, to justify their violation, for any cause whatsoever. Courts and juries are solemnly sworn and strongly bound, to judge and determine according to truth, and according to law. If any circumstances, foreign to these, seem to require indulgence, our constitution has provided for them, by an application to the supreme executive power. But judges and jurors cannot justify themselves, by any reason, whatever, for breaking down so sacred a tie of conscience, and so essential a pillar of our government.

Justly then does the oath of a grand jury, with unusual, lengthened, and repeated care, inculcate a conscientious discharge of this sacred trust; the diligence of their enquiry, the truth of their presentment, their entire freedom from hatred, envy, love, fear, favour, or reward, and the utmost exertion of their unbiassed judgment and understanding, in all the matters, which may come before them, or be within their knowledge. Neither a hasty or careless, nor a timid or partial discharge of this duty will correspond with the strong obligations laid on the conscience by this oath.

The *matters*, which, whether given in charge, or of their own knowledge, are to be presented by the grand jury, are all offences within the county. To grand juries is committed the preservation of the peace of the

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county, the care of bringing to light, for examination, trial, and punishment, all violence, outrage, indecency, and terror, every thing that may occasion danger, disturbance, or dismay, to the citizens. Grand juries are watchmen, stationed by the laws, to survey the conduct of their fellow citizens, and enquire where, and by whom, public authority has been violated, or our constitution or laws infringed.

Of all acts of violence those are the most dangerous, which are committed by private citizens, without authority, to redress grievances of a local nature. For these are generally committed with deliberation, under specious pretences of justice, and the violence and outrage is reduced to a system, supported by mutual countenance, and boasted of as patriotic labours. A particular neighbourhood feels an inconvenience, which there are no legal means ready to remove; the inhabitants fly to arms, remove it by force, and call this liberty. A name so sacred imposes on the imagination, casts a false lustre on the foulest deeds, and men gradually heated by their enthusiasm, believe themselves inspired with liberty, because they have long said so.

This deserves some explanation. There are two kinds of liberty; liberty in a state of nature, and liberty in a state of society and government; the liberty of the man, and of the citizen. In a state of nature, one man has no right of control over another; and every man is free to do as he pleases. This natural liberty soon becomes intolerable: for, all acting according to their inclination, each man becomes a prey to the passions and power of all; life becomes a state of mutual fear, danger, and suffering; and the world is peopled only with tyrants and martyrs.

To relieve themselves from a calamity so cruel, the genuine effect of natural liberty, numbers unite, and agree to submit their will and actions to the mutual control of each other. It is no longer a man's own will, but the will of the society or state, that is to guide his conduct, and, when duly declared, be the rule of his obedience. Civil liberty now takes place of natural liberty; men, no longer free to do as they please, are free only to do what the laws permit, and the will of every individual must be conformed to the public will, that is to the laws.

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If the laws appear disagreeable or unjust, what means of remedy ought the citizen to use? Argument, remonstrance, a change of representatives; and, if the evil continue, and overbalance the advantage of the government, a separation from the state. But no evil can be so great, as that complication of mischiefs, which result from natural liberty opposing law. In opposing laws, whom do we oppose? Ourselves: for laws flow from the people. But we dislike them. It may be so: What law will please all? To say that no law shall be obeyed, unless all approve it, is to say, that there shall be no law, and men shall live in the state of nature. Those laws, which we dislike, have been approved by a majority of the citizens, or they would not exist. It is the fundamental principle of a republic, that the will of a majority shall govern the whole state. If those laws be the will of a majority, they are intitled to obedience.— If they be not, a just remonstrance, or a change of representatives, will draw forth the true will of the people; and it is impossible, that ever force should long be necessary, to make the majority do, what the majority wills. If these are true (and they are the true) principles of our government, force can never be necessary; but to oppose the will of a majority, by the will of a smaller number, that is to subvert the constitution, destroy the fabrick of civil authority, and bring us back to the state of nature, anarchy, and confusion. This is an end, which no man will avow; yet, on no other principle, can private force, against the general will, be justified or supposed. Every wise man will rather submit to the evils of a law, till, by a constitutional opposition, they can be removed; or, if the removal become hopeless, and the evils too great to be borne, withdraw himself from a government, which, instead of protecting, oppresses him. But no consideration will ever induce him, to have recourse, for a remedy, to the worst of all political evils, forcible resistance to the will of a majority. If ever the hand of an individual be lifted up against a lawful exercise of public authority, the essential dignity of government receives a wound, dangerous to the state, and to be cured only by the submission and atonement of the offender. If one man, or one set of

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men, may, without constitutional authority, assume the right of opposing the laws, every man, for any cause, may do the same. If one individual assume the right of doing what he please to another; this other may assume the right of doing what he pleases to him, and to every one else. It is no longer law, reason, and justice, but force, fraud, and malice, that govern; safety and peace, the fruits of civil liberty, are banished with it; and men are reduced again to a state of natural liberty, where each man may do what he pleases to all; where, all having liberty, no man can be free, and society becomes a den of thieves, robbers, and cut-throats.

It must be matter of regret, to every man of any reflection, that symptoms of this dangerous spirit should be so daringly manifested in this county.* There are two causes, which have excited, and, in the opinion of many, perhaps, justified it. The excise, and the county tax for this year. It is not necessary for me, to say any thing in defence of the excise law, in order to shew, that opposition to it, by force and arms, is fatal to liberty, and just government: for, on the principles which I have stated, and do sincerely believe, private force, opposing any law, good or bad, is the worst of all political evils, and productive of the worst kind of slavery, slavery to every man, whose malice or force may render him dangerous.

I cannot, therefore, but consider what happened in Washington, in the evening of the 24th of August last, as a most dangerous insult to civil government, and deserving the detestation of all good men. About thirty men, armed and blacked, rode through the streets; surrounded, entered, and searched, the house of William Faulkner, with a design to seize and punish the Inspector of Excise, who had advertised an Inspection office at that house. In my idea of their crime, it is not necessary to take into view their intention, to render their conduct criminal. The single circumstance, of their coming with their faces blacked, proved their design unlawful, and not fit to be avowed; discovered a consciousness of this guilt; and, especially armed, as they were, naturally and necessarily, occasioned dismay and terror to all peaceable citizens. If those things may be done, for a good purpose, they may be done for a bad,

* Washington.

or a good purpose may be pretended. The thing itself is criminal, whatever be the object pursued by it.

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The other subject of complaint, opposition to which has been made in a like forcible manner, is the county tax for this year. The court-house and gaol of this county having been burnt down, the commissioners, with great deliberation, and after consulting the laws, and almost every man qualified or disposed to give them advice, believed they had sufficient authority to build a new court-house and gaol. A law, passed a few years before, authorised them also to build offices for the preservation of the public records and papers. With like deliberation and counsel, the commissioners believed it their duty, to undertake all the buildings at once, because all were greatly wanted, and there was manifest expence, inconvenience, and danger, in delaying them. Unfortunately, one part of the county had then an intention of being separated from the rest of it; and, therefore, thinking themselves at liberty to act, as if they were separated, resolved to refuse their portion of the tax.—A party of men assembled in each of the townships of Green and Cumberland, and, by threats and force, took the duplicates from the collectors. This is an act of violence, which no pretence can justify. Your duty, therefore, requires from you the severest animadversions on its authors, their advisers, and abettors, who, in the eye of the law, are all guilty. In the case of John Pollock, the collector of Green township, there is reason to suspect, that he was in collusion with the perpetrators of the outrage, and voluntarily and of purpose suffered the trespass. If this be true, it is a gross misdemeanor in office, and, as such, presentable by you.

It must be the wish of every peaceable man, that the people of those townships were better advised. Is this a tax of such vast burthen, as to induce men to break through all the bands of society and peace? Is any thing more required of that part of the county, than has been exacted from every part of the state; that each part of a county should bear its proportion of the whole current expences, so long as it remains in connection with the rest? Have not most of the counties over the mountains contributed to two sets of public buildings in the county whence they were severally taken; and

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some of them immediately before their separation? And is it reserved for us, to set the only example of violence and riot? Are we the only ruffians in Pennsylvania? If the tax be unlawful, are not the courts of law open for redress? If it be unjust, would the legislature be deaf to a remonstrance? Force can never be necessary, in a regular government, but to support a bad cause; and the very use of force implies, that the cause is bad, and that neither law, justice, nor reason are on its side. Was the county of Washington to suspend its public buildings, till the determination of the assembly on the petition for a new county, should be known; when experience has shown us, that such deliberations usually take up several years? How long has the question about the division of York county been agitated? Yet it is notorious, that the petitioners had better grounds of hope of success two or three years ago, than they have now. In the little time that the public buildings of this county have been delayed, a number of the inhabitants of this town, from a respect for justice, and for the peace and safety of the county, which might be endangered by the escape of the prisoners, have been under the necessity of keeping guard, every night, for three months past. The prothonotary's office of this county is now kept in a small wooden apartment, adjoining the kitchen chimney. The register's office is in the same situation, and immediately above the kitchen. The slightest carelessness or resentment of a servant may, with a single spark of fire, destroy property of more value than twenty court houses, gaols, and offices, and occasion endless disputes, and confusion of debts and titles. Is the amount of this tax such, as a respectable part of the county should be willing, for the sake of it, to sacrifice their character of peaceable citizens? Two townships, far the largest in extent and property, and supposed sufficient for a new county, pay but one ninth part of the whole tax.

Having thus recommended to your attention those violations of the public peace, I have done my duty. If you, or any of you, know any of the persons concerned in them, you are bound by the oath which you have taken, and by that duty, which you owe to God and your country, to inform each other of their names

and offences, to deliberate thereon, in full jury, and make a solemn and true presentment thereof to the court. If you do not, "sin lieth at your door," you violate your oath of duty, and your consciences are stained with the guilt of those men, and the broken peace and laws of your country.

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No. VI.

*Separation of different branches of power in a Republic.
Duty of Courts and of Juries as to Law and Fact.*

A REPUBLICAN government is a complex machine of ingenious construction, where the moving power is controuled by the wheels put in motion by itself. A monarchy is simple, consisting of one power without restraint. In a monarchy, the sovereign possesses all power, commands all, and is commanded by none: the mouth of the sovereign being the only statute book, the law is whatever he chooses to pronounce. But, in a republic, the people give power to their ministers, to command themselves: the people: the sole source of authority, and conscious of their power, have placed guards over their own passions, and distributed various portions of their power into various hands; wisely poising the different parts, that they may be dangerous to none, but salutary to all. Thus the watchful husbandman, whose lands are watered by a stream, which, in the swell of storms, overflows its banks, sweeps away his corn, and covers his soil with barren sands; with prudent and patient industry, turns its course into many channels, which winding through his fields, in separate courses, break the madness of the torrent, and diffuse, through every part, its beneficial influence. The power of a republic is a gentle and steady breeze, which just fills every sail, and moves the vessel uniformly in its course. The power of a monarchy, like a hurricane, carries destruction to every opposing object.

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Perhaps I might save the observation, that, by a monarchy, I mean here a state where one man has authority to make laws, or, in other words, despotism; and, by a republic, a representative democracy, where power is justly distributed and prudently exercised.

As the salutary effects of a republic arise from the delegation, and just distribution of power, it follows, that, where these exist not, where the whole people administer the government themselves, or where any one part of the administration usurps the power of the rest, the utility of a republic is lost, and all the mischievous effects of a monarchy remain. The faults of both governments are retained, without the virtues of either; and the government, like a fallen angel, becomes a complication of wickedness, without any mixture of good.

One will not wonder, therefore, that a people, jealous of their liberties, should, in the formation of their government, use the utmost caution, to preserve the operation of each branch of its administration distinct, and uninterrupted by any other, or by the people themselves. Yet a republican government is not a disjointed mass of various and discordant materials, but a regular combination of authorities mutually dependent, a system of powers hanging together, nicely fitted to each other, and closely connected in their operation. If one is interrupted, all are destroyed. They all act upon each other, by the exercise of their several functions on the same objects. The people act upon all, by remonstrance, or removal of their ministers from administration. But if ever one branch, stepping beyond its functions, usurps the authority of another, the government degenerates into a tyranny in the usurping branch. And if ever the people seize any of the delegated functions of administration, or, which is the same thing, by menaces, violence, or irregular will, overawe or control their ministers, in the exercise of their functions, the government degenerates into anarchy. Slavery is the consequence of either: for it is alike slavery, though of different kind and degree, when there is no government, and when there is a bad one.

The same reasons, which establish the necessity of the distinct and uncontrolled operation of each branch

of government, establish also the necessity of freedom in the operation of the several parts of each, where the branches, as they generally do, consist of several parts. Any mixture, or usurpation of any of the parts destroys the constitutional balance, operation, and effect of the whole, and produces confusion in that branch, and, through it, in the whole system. For so exactly moderated is the machine, that, whatever destroys the balance or effect of one branch, removing its operation on the rest, gives to some one of them a predominancy, and destroys the balance and effect of all the branches of the administration. *Dec. Sess. 1792.*

In every branch of the administration of government, the people have retained a certain influence. In the making of laws, the most important branch of the administration of government, the people have great influence, from the frequency of elections, and the number of representatives. In the executive branch of government, the influence of the people, though less, is yet great. The nature of the duty requires a delegation to a less number, and for a greater time. Yet the new appointment, though later returns at last, and the delegate, in all his conduct, looks forward to that day, when he shall be stript of his authority, and can hope for a re-investment, only if his conduct have deserved it. In no branch of the government have the people retained, in some respects more, and, in some respects, less influence, than in that to which you and we are now called, the administration of justice.

This branch consists of two superior parts, a court, and a jury. The courts in this state are filled by men, numerous enough indeed, to be a sufficient representation of the people, but, of necessity, far removed from their will; because the nature of their duty frequently placing them between government and individuals, and therefore requiring perfect independence, their appointment is more durable than that of any other branch of the administration. Juries, selected from the people, by an officer of their own election, are so numerous, and so frequently changed, that they may well be considered as the people themselves, exercising this branch of the administration. The exercise of this branch of the ad-

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ministration, by the people, that is, by an abstract of the people, a jury, has long been viewed as the safeguard of our liberties, and preserved with the utmost jealousy. Danger to it is to be most apprehended from two principles, very strong in the human breast, the love of money, and the love of power. For I reckon jury trial in equal danger, by usurping too much power; as by retaining too little. It is in danger from usurping too much power, because every abuse of power prepares the mind for its abolition. It is in danger from retaining too little power, because, without exercise, the right may be forgotten and abandoned.

The love of money, or a principle of economy, may prove hostile to the trial by jury. A desire to obtain the advantages, without the burden of government, sometimes sacrifices liberty to economy. Men enquire not what is free, but what is cheap. This is strongly manifested in the encroachments, which are daily making on jury trials. For highly as we prize the trial by jury, and intimately as we know it to be connected with the dearest principles of civil government, it seems to avail nothing, when it stands in opposition to our spirit of economy, or love of money. Every legal method of deciding facts, without the intervention of a jury, is an encroachment on the constitutional authority of the people, in the administration of justice. All summary convictions, for penalties, before justices of the peace, are corruptions of the genuine spirit of civil liberty, and invasions of the people's influence in government. All summary proceedings, in actions of debt, are of the same dangerous tendency. Yet, in the space of a few years, they have been greatly extended, and the minds of the people seem to be fully prepared for farther extension, which, by degrees, may have no limit. I fear not this, only from an apprehension, that wrong decisions may be given. Important as the aggregate of small debts in Pennsylvania must be to the suitors, I look upon it as a light thing, compared to the high political principle involved in this fashionable progress. For, in this progress, we may gradually habituate the mind to trials without jury. The same principle of economy may lead us to extend this summary proceeding to all actions of debt. The same principle may tempt us to extend

it to all actions whatever; and, where not only property, but fame, liberty, and life itself, is at stake, the trial may be without jury. Jury trials may be refused, from disuse, may be forgotten, and, this pillar of our liberties being removed, we may forget that we were free. It is remarkable, that, while the people of Pennsylvania, are making such rapid strides to the extinction of jury trials in civil cases, the people of Scotland and of France, who never knew, or have long forgotten, this principle, are labouring for its establishment. So true it is, that we seldom prize a blessing, while we enjoy it.

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I said also, that the love of power is unfavourable to jury trial, and therefore to liberty, as tempting its possessors to usurp too much, and risk the loss of all. The deprivation of all power is one of the natural consequences of usurpation. If juries, therefore, not content with the exercise of authority intrusted to them by the constitution, will abuse their own, and usurp on the constitutional authority of courts, make the law depend on their changing fancies, or bend to their prevailing passions; and, reducing all law to a state of uncertainty, not less, and perhaps more, dangerous, than a want of all law; introduce a slavery of the most miserable kind, a slavery to the passions and opinions of all, no man will know how to act, so as to remain safe, and every man, in his own defence, will rise up against a jury trial, which cannot be preserved from corruption, and of which the corruption is so dangerous.

Placed between extremes so full of peril, it may be worth our while to enquire, what is the authority in the administration of justice, which the principles of our constitution have intrusted to juries, and what is the strict constitutional authority of courts.

The separate authority of each is defined, in the well known maxim, "*ad questionem facti non respondent iudices; ad questionem juris non respondent juratores.*"* I shall be excused for quoting this maxim in a dead language; for, in this language, it is usually expressed. Translating it literally into our own tongue, the maxim is, *To a question of fact, the judges do not answer; to a question of law, the jurors do not answer.*

* Hargr. Co. Lit. 155, 6. Foster, 255—6.

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All disputes are about either law or fact: either whether the facts are as one party asserts, and the other denies; or, the facts being admitted or proved, whether they are correspondent to law, whether the law calls them lawful or unlawful, right or wrong. According as the question is of the one kind or the other, it is to be answered by the one or the other branch of the administration of justice. If the question be, whether an assertion be true or not, its truth or falsehood is to be determined only by the jury. But, supposing it true, if the question be what the law says of it, whether it be right or wrong, or in what degree it is wrong, it is to be determined only by the court.* According to this maxim, therefore, questions of law belong to the court, exclusively of the jury; and questions of fact belong to the jury, exclusively of the court.

Startled at this conclusion, necessarily drawn from the maxim, in its genuine original form; and jealous for the privileges of a jury, thus rendered, in matters of law, totally dependent on the court; some have strenuously asserted their total independence, even in matters of law, and earnestly contended, that it belongs to a jury, to judge of the law arising on the fact, as well as of the fact itself; and have given the maxim, in terms, which, though not supporting, do yet less oppose, their sentiments, as the words of exclusion are omitted, and, according to them, the maxim is, *that jurors answer to questions of fact, and judges to questions of law.*†

The first part of the maxim, that it belongs to the jury only, to judge of matters of fact, is not disputed: for courts have never contended, that they have authority to say, whether an issue be true or not; and have always conceded, that this is the proper and exclusive province of a jury, within which, they are not to be disturbed, if they have evidence, whereon to found their opinion. But as juries have no ground to found any opinion of facts, until evidence of them be exhibited to them; so courts have no ground on which to found any

* *Kelyng fined a jury for giving a verdict of manslaughter, on facts, which as he directed them, amounted to murder. Hood's case. Kel. 50.*

† *Eunomus, 270.*

opinion of law, until facts (unless admitted) are found by a jury. Law cannot be declared by a court without facts; nor facts, by a jury, without evidence: and courts acknowledge, that offering *evidence* to them is laying no foundation for an opinion of law. For *evidence* must be offered to the jury, and, from the evidence, the jury must declare the fact, before the court can pronounce the law. And, in special verdicts, when juries, instead of finding facts, have found only evidence of the facts, courts have declined giving any judgment, lest they should interfere with the province of the jury, and determine fact, as well as law.* Neither is it denied, that it belongs to courts to judge of matters of law; but it is said, that, in this they judge not exclusively, but the jury has a kind of concurrent jurisdiction with them. The duty of courts being thus agreed on; that it is their duty, to judge in matters of law; and that it is not their duty to judge in matters of fact; it is not necessary to say any thing further on this point; and we may proceed to examine the disputed part of the maxim, that the jury have *no* authority, to judge of matters of law.

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This dispute has chiefly arisen, from the zeal of the people in defending themselves against some overstrained exertions of public authority in Britain, in state trials, particularly in the case of treasons, and yet more particularly in the case of libels. In these cases, the line between a necessary and dangerous resistance to government, and between the freedom and the abuse of the press, may have seemed so narrow, and it may have seemed so important to liberty, that it be well guarded, as to incline jurors to be afraid of trusting its guardianship to a judiciary dependant on the crown; to pass beyond the limit, and retain or usurp more power, in these cases, than may accord with strict constitutional principles; and, in order to justify their usurpation, in these cases, to contend for like authority, in all cases whatever.

Those, who, in opposition to this claim of juries,

* *vid.* 5 *Bac. Abr.* 285-6, 312-3. 10 *Co.* 56-7. 1 *Str.* 85. 1 *Wils.* 56. 5 *Burr.* 2669, *Kel.* 109.

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1. From the nature of juries composed of the people, taken indiscriminately from all ranks, professions, and trades, by turns, and for a short service, it is impossible, that they should be qualified, to decide nice questions, in an abstruse and intricate science, as the law of England is, and as all laws, in length of time, become. And it is not to be supposed, that any juridical constitution, would vest the interpretation and declaring of laws, in bodies so constituted, without permanency, or previous means of information, and thus render laws, which ought to be an uniform rule of conduct, uncertain, fluctuating with every changing passion and opinion of jurors, and impossible to be known till pronounced. The only means of information, that jurors can have of the law, are the statements of the advocates on both sides, or the declarations of the court. The statements of the advocates will, if possible, be contradictory, and always interested; and it can be only from the declarations of the court, that the jury can take the law.

2. The duty of a jury may be learnt from their oath, "well and truly to try the issue joined, and true verdict give according to the evidence." *"The issue joined,"* or the point in dispute, which is submitted to the trial of the jury is matter of fact; the rule according to which they are to give their verdict, is *the evidence*, evidence is always applied to fact; for it was never heard, that evidence was given of the law, or that it was submitted to the jury, to find what the law is.†

3. In the course of the trial, if an incidental question of law, not involved in the issue, occur; as respecting the competence of witnesses, &c. it is decided by the court only, and to it the jury have nothing to say. And the very issue itself, by an application for a nonsuit, for want of evidence, or by a demurrer to evidence, may be entirely withdrawn from the jury, and given up to the decision of the court alone.

* *Eunomus* 270-9. *Hargr. Co. Lit.* 155-7.

† 5 *Burr.* 2669. 2 *Burr.* 1216—28. 1 *Bla.* 295—300.

4. If the jury, in their verdict, state the facts, and draw from them a conclusion, different from that which the law would draw; the court will alter this conclusion, and make it conformable to law.* And if the jury, either of themselves, or conforming to a misdirection of the judge, find a verdict, implying facts, of which no evidence was given at the trial; or if they state facts, legally inconsistent with their verdict; the court will set this verdict aside, for want of facts to warrant the legal conclusion implied in the verdict. Courts have even gone so far, where an intricate question of law was involved with the fact in a general verdict, as to set aside this verdict, because the jury refused to find a special verdict, which, stating the facts only, leaves the law to the decision of the court.† Courts would have no power to do these things, if juries may decide law as well as facts.

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5. That the province of juries is to decide only matters of fact, appears from this; that, when law only is concerned, the question never goes to a jury. Thus, in demurrers, special verdicts, and cases stated; either by consent, or without consent of the parties, or by admission of the jury; is it acknowledged, that it belongs to the court only, to determine matters of law; and that juries are called only to decide matters of fact. Wherever the facts are acknowledged, as in a demurrer; or agreed, as in a case stated; or proved, as in a special verdict, there is nothing for a jury to do: the court decides according to law. Till the facts are found or admitted, courts have no ground to go on: after the facts are found or admitted, no room remains for the interference of a jury; unless it be necessary to ascertain also the consequences of the facts, as in the case of damages, in doing which they are still within the province of fact, and not of law.

Such are some of the reasons, on which it is contended, that juries have no authority, to decide questions of law. Indeed, if to their authority of deciding on fact, were united that also of deciding on law, the power of

* 1 H. H. P. C. 471.

† *King, vs. Pole*, (cases B. R. temp. Ld. Hardw. 26) *Ilargr. Co. Lit.* 156, b. *vid.* 1 P. Wms. 212, 3.

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courts would be annulled. Courts would become mere regulators of form, and, in matters of substance, only advisers: their authority, and, with it, all uniformity of law, would be prostrated to the passions or prejudices of juries, unexperienced in the consequences of their own decisions; all rules of action and property would become precarious or ineffectual, and the salutary mutual restraint of two authorities, in this branch of government, would be destroyed.

In opposition to these arguments, so far as I have observed, only one reason has been offered, of any considerable force. This is, that, in the issue, especially if it be a general issue, both law and fact are involved; the jury, by finding a general verdict, either for the plaintiff or the defendant, which (under the peril of an attain, or of having their verdict set aside) it has never been denied, they may do,* may decide both the fact and the law, and leave nothing to the court, unless there be room to impeach the verdict, but the mere formality of giving judgment. And, perhaps, in the history of England, there may have been times (though, since the independence of the judges, such times no longer exist) when, in state prosecutions, especially for treasons and for libels, it may have been necessary for the liberty of the people, to claim and exert this important check on a standing body of men, so liable to undue influence from the crown, and so influential on the happiness of the people, as the judges were.

The conclusions, which I would draw, from these arguments on both sides, are these—Strictly and properly, it belongs only to courts, to decide all questions of law. But, wherever, in any issue, the law is involved in the fact, the jury may decide both, by a general verdict. But the doctrine of attainments, and of new trials, proves, that they do this at their peril, and under the control of the court. In trials, it is the duty of judges, for the assistance of the jury, to separate the law from the fact; summing up the evidence, to submit the facts, of which there is evidence, to the decision of the jury; and, making the various suppositions, that can be made, of the different ways, in which the facts may be found,

* *Litt. § 368. Co. Litt. 228. 5 Bac. Abr. 284.*

to declare the law arising out of each ; and to charge the jury, if they find the facts in this manner, the law dictates, and they ought to find, this verdict ; if they find the facts in that manner, the law dictates, and they ought to find, that verdict ; or, if there be difficulty in point of law, they may, or they must, find a special verdict, which, stating the whole facts on the record, may claim the decision of the highest legal authority.— In the discharge of their several duties, mutual respect is due between courts and juries. It is incumbent on courts, to yield all possible deference to the opinion of juries, in matters of fact ; and it is incumbent on juries, to yield all possible deference to the opinion of courts, in matters of law. Acting thus, courts and juries mutually check the extravagancies of each other, and generally produce moderation and justice. But, if they act otherwise, if courts take upon them to think differently from juries, in matters of fact properly before them ; or if juries take upon them to think differently from courts, in matters of law ; they destroy this balance, and mutual check ; one branch usurps the authority of both ; the other becomes a mere nullity ; there no longer remains any use for a court and a jury ; courts may decide facts, without juries, or juries decide law, without courts ; there no longer remains any restraint on extravagance of opinion ; the constitutional balance of this branch of government is destroyed ; the destruction of the balance in this branch, destroys the balance in the whole system of government ; and thus a way is laid open for the destruction of the government itself.

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No. VII.

*Persons exempted from Punishment as incapable of Offence.
Manner in which Offenders may be Guilty.*

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OFFENCES, crimes, or misdemeanors, are violations of some public law, or omissions or abuses of some public duty, in which the peace, authority, or interest of the whole community is concerned; and they are thus distinguished from injuries, or violations or omissions of some private duty, by which individuals alone are affected. An offence generally implies an injury and something more: for in most, if not all, public offences, an injury to some individual is involved.

To distinguish them minutely, an offence may be considered as the general word, including both crimes and misdemeanors. A crime is an offence of a higher nature, or capital. A misdemeanor is an offence of a lower kind, and not capital.*

Public laws are general rules prescribed for all the citizens. It must not be left a matter of indifference, whether laws be obeyed or not; but sanctions must be annexed to them. Hence come punishments, which are evils or inconveniencies, following the breach of a public law, or omission of a public duty.

Taking the will for the deed, an attempt to commit a crime was antiently held equivalent to its actual commission. But this doctrine has long been exploded; and, to constitute the crime, the intention must be carried into effect.

As, to constitute an offence, there must be an evil intention, and an unlawful act; there can be no offence, where there is no will to do evil. Want of will to do evil may proceed from want of judgment, or from want of liberty. For, there can be no will to do evil, where there is no judgment to discern between evil and good; nor can any will to do evil be imputed, where no choice of conduct is left, and the agent acts from necessity. Punishments being consequences of crimes, those cir-

* *Woods's Inst.* 344.

circumstances, which constitute crimes, are necessary to render punishments lawful: to subject a man to punishment, for the breach of a law, or the omission of a duty, he must have discretion of mind, to know the law and his duty, and freedom of will, to follow this discretion; and no man, therefore, can be either convicted or punished, who wants either judgment or liberty.

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Want of discretion may be either voluntary, as in the case of drunkenness; or involuntary, as in the case of infants, idiots, and lunatics.

An infant, under the age of seven years, is considered by the law as altogether incapable of knowledge or discretion; therefore capable of no offence, and liable to no punishment. Above the age of seven years, this presumption may, in some cases, be controverted: the law distinguishes between his actions. From that age, till the age of fourteen, he seems to be liable to punishment, only for capital offences. And, even in the case of a capital offence, an infant, though above the age of seven, if under the age of fourteen years, is presumed incapable of discretion, unless strong circumstances of cunning and malice equivalent to natural discretion, be manifest, to prove the contrary. Above the age of fourteen, an infant, being presumed of sufficient discretion, to know their enormity, is liable to punishment for all capital offences, and for notorious breaches of the peace, as riots, assaults and batteries, &c. but in some cases of common misdemeanour, especially in cases of omission, an infant, having no command of his fortune, is exempted from fine and imprisonment.

Idiocy, implying a total and permanent absence of reason, destroys all responsibility in the unfortunate subject of it; and an idiot is never punished for any crime whatsoever. Lunacy, while it exists, equally excuses from punishment; but, as it admits intervals of reason, for an offence committed in a lucid interval, a lunatic is answerable.

To this head may perhaps be referred that temporary madness, arising from sudden passion, which, when reasonably provoked, and not exceeding the usual frailty of human nature, though it does not justify, sometimes extenuates, the crime, and lessens the punishment.

* 3 *Reeve's Eng. Law.* 413. 4 *Comm.* 21.

March Seff. Misfortune, accident, ignorance, or mistake, under certain circumstances, implying a total absence of will to do evil, are also grounds of excuse. But the man, who would excuse himself, for an offence committed by accident or misfortune, must have been engaged in a lawful act, when the accidental mischief happened.—For, if he was doing an unlawful act, he is answerable for all its consequences, and, therefore, must answer for the accidental mischief, which it produced. So also the ignorance or mistake, which excuses, must be ignorance of fact; for ignorance of law excuses no man. A man may be excused, if, doing what he lawfully might do, he, through mistake, does an unlawful act. But, if a man, believing that he has a right, which, in fact, he has not, intentionally does an unlawful thing, believing it lawful, he is not excused. If every man were not presumed to know the law, guilt could not be detected.

Voluntary want of discretion, as that produced by intoxication, though depriving the agent of the principle of responsibility, yet, being the effect of his own voluntary act, and what may be procured on any occasion, and for any purpose, leaves him answerable, both for that, and all his conduct, while in that state of mind.

Want of liberty excuses for offences committed by constraint. This constraint may be either natural or civil.

Civil subjection, of certain kinds, excuses for some offences, though not for all. The principal case of this kind is that of a wife committing an offence by the coercion, or the command, or in the presence, which is considered as the command, of her husband. But the offences committed by a wife, for which she is excused, on the principle of subjection to her husband, are those committed against the laws of civil society. For offences against the laws of nature, as murder, and the like, (unless in the case of accessories after the fact*) are not excused, by this civil subjection. And even offences against the laws of civil society (which, creating this subjection, excuse the infractions of them occasioned by it) are not all excused. In the highest offence as trea-

* 1 Hale's P. C. 621.

son, which violates an obligation yet stronger than the conjugal tie, and in the misdemeanor of keeping a brothel, which is usually committed by the agency of her sex, and could not be restrained, if this impunity were general, the wife is not excused, by her marital subjection. *March Seff.* 1793.

The civil subjection of a son to a father, and, in England, where slavery exists not, of a servant to his master, is no legal excuse from punishment. But slavery, being a species of civil subjection, at least as strong as marriage, ought to extend to the slave, the same exemption, that marriage extends to the wife,

A similar privilege of excuse from punishment, is allowed to those, who commit offences by natural subjection; as when constrained by superior force, and well grounded fear of death, or bodily harm.* But neither does this privilege extend to heinous offences against the laws of nature, as the murder of an innocent person, which even the fear of death will not justify.

Having thus considered the persons, who, as incapable of crime, are exempted from punishment, we may now consider the manner, in which each person, capable of crime, may be considered as offending.

A man may be guilty of an offence, either as a principal or as an accessory.

Principals are in two degrees. A principal in the first degree is he who is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present, aiding and abetting the fact to be done; whether he be immediately present, as within sight or hearing of the fact; or constructively present, as keeping watch or guard, at some distance, while another commits the offence. Aiding and abetting are essential: for, if several combine to do an unlawful act, and one, without the knowledge of the others, do a different unlawful act, not in prosecution of the first, nor the natural consequence of it; the others are not principals, in this act, to which they gave no approbation.† But where there is no immediate perpetrator, or none capable of an offence, as where a man makes use of a madman, a wild beast, a trap, poison, or the like, to commit a crime;

* 1 Hale's P. C. 30. Foster 14.

† Kzl. 112—18.

March Seff. though he be not present, when the very deed is done, 1793. he is guilty, as a principal in the first degree; for there is no other criminal, much less superior in guilt, whom he could aid or abet.*

Formerly, principals in the second degree were considered only as accessories; but now, to permit their trial, while the facts are recent, though the perpetrator should not be amenable, they are considered as principals; and an accessory is one, who, being neither an actor in the offence, nor present at its commission, cannot be a principal, either in the first or second degree, but is yet some way concerned in it, either before or after the fact.

An accessory before the fact is he, who, without being present, or aiding and abetting, at its perpetration, encourages, counsels, or commands the perpetration of a crime, either by influencing, or procuring others to influence the perpetrator; or who, knowing the intention of perpetrating a crime, furnishes assistance, or means of its perpetration; or who, by shewing an express liking, approbation, or assent to the felonious design of another, abets and encourages him to perpetrate it.† And he is not only accessory to the crime, which he thus procures, but to all its probable consequences; as if one instigate another to beat a third person, and he beat him so that he dies, the actor is a principal, and the instigator an accessory in murder. So also, if one instigate another to commit a crime, and, yielding to that instigation, he commit a crime, in substance, the same, though different, in manner (as if to shoot a man, and he stab him) the instigator is an accessory to the crime actually committed. But if the crime actually committed be different in nature from that procured, the instigator is accessory only to the crime which he procures; as, if one procure another to burn a house, and, in doing it, he commit a robbery; the actor is guilty, as a principal, both of the burning and the robbery, but the instigator is accessory only to the burning; for it was not his counsel, but the wicked mind of the actor, that suggested the robbery.‡

* *Kel.* 52—3.

† 2 *Hazuk.* 445.

‡ *Foster* 372. 4 *Comm.* 37.

An accessory after the fact is he, who, knowing of the commission of a crime, at which he was not present, nor aiding or abetting, receives, relieves, comforts, or assists the criminal. The crime must have been compleat, previous to the assistance given to the criminal; otherwise the assistant is not an accessory: as, if one wound another, and after the wound given, but before death ensue, a person assist the delinquent, he is not an accessory to the homicide; for he could not know, that it was an homicide, till the death ensued. *March Seff.* 1793.

To relieve a felon with necessities or conveniencies, while in gaol, or in the custody of the officers of justice, or under bail for his appearance, can be no offence; for the assistance, which is criminal, must be of a nature tending to the hindrance of justice, by the escape or concealment of the offender; as furnishing him with a horse, to escape from his pursuers, money or victuals, to support him, in his flight or concealment, a house, to shelter or conceal him, force, to rescue him, or instruments, to break the gaol, or bribing the gaoler, or, in a gaoler, being bribed, to suffer his escape.

Except in the case of a wife assisting her husband, which she is bound to do, or by his coercion assisting any other felon; and, on the same principle, of a slave assisting his master; such assistance, as makes an accessory after the fact, is equally criminal, whatever relation may subsist between the felon and the accessory. For a son, to assist his father, or a father his son; a master his servant, or a servant his master; or even for a husband to assist his wife, to elude justice for a crime; however excusable in point of conscience, is, in the eye of the law, as criminal, as the same assistance to a stranger. An unfortunate necessity, that civil obligation should be opposed to the dictates of nature!

In offences committed without premeditation, as manslaughter, or homicide by chance or misfortune, there can be no accessory before the fact: their nature excludes any counsel, command, or procurement. And it is a rule of law, that in treason, the highest of all offences, the heinous nature of the crime seeming to render all participation in it worthy of the greatest indignation and punishment; and in misdemeanors of

March Seff. inferior kind, as trespasses, riots, forgery, and petit larceny; because the law will not readily descend to nice distinctions, in very small matters; there are no accessories; but all concerned are principals.* But, in some kinds of trespasses, there appears a difference between a connection with the offence before and after its commission.† In general, accessories can only be between those extremes of the highest and lowest guilt; for, whatever would make an accessory in felony, in them, makes a principal.

As no man can be an accessory, unless an offence has actually been committed, the common law, like common justice, directs, that, though the conviction of the principal may be controverted by the accessory, yet the accessory cannot be tried (unless together with the principal) till after the conviction of the principal.‡ And if an offence which excludes accessories has been committed; and one be charged with it, in a manner, which, in another sort of offence, would make him only an accessory, but, in this, a principal; this difference being only artificial, the same rule of natural justice requires, that the real principal be first convicted, before this artificial one, who, whatever name may be given to him, is, in fact, but an accomplice, should be put upon his trial. For otherwise, after this man, who must either be not guilty, or less guilty than the principal, has been punished; it may appear, that no crime has been committed, or the person principally guilty may escape.¶ Statutes have, in some cases, altered this, and directed prosecutions against the accessory, independent of the principal, as for a misdemeanor.¶

A man indicted as accessory, and acquitted, may, afterwards, be indicted as principal. And a man indicted as a principal, and acquitted, may, afterwards, be indicted as an accessory after the fact, if not as an accessory before the fact. For the offences are, in the eye of the law, specifically different; and, therefore, a strict rule of law, respecting the same offence, cannot avail to obstruct justice.**

* 2 *Hawk.* 439.

† 4 *Comm.* 40, 324. *Foster* 365.

‡ 1 *St. L.* 138. 3 *St. L.* 120.

¶ 361, 2 *Hawk.* 373, 1 *Hale P. C.* 625.

† *Ib. Cro. El.* 824.

¶ *Ib.* 343. 1 *Hale P. C.*

** 4 *Comm.* 40, *Foster*

In point of conscience, there may sometimes, be no difference between the guilt of the accessory before the fact, and of the principal. The adviser may even be the most wicked. And yet, in point of policy, the punishment of the principal may be rendered greater, to make it more difficult for the contrivers of mischief to find instruments. In point of conscience, there surely is a difference between the guilt of the principal, or of the accessory before the fact, and that of the accessory after the fact, whose offence may proceed only from pity for the unfortunate situation of the criminal; yet, in point of policy, it may be necessary to make him equal in punishment, to render it difficult for offenders to escape from justice. In point of law, they were all formerly considered as equal in guilt and punishment; but subsequent statutes have made distinctions, according to the real or supposed principles of policy and justice.*

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We have now considered the persons, who are capable of offence and liable to punishment, and the manner in which each offender may be considered as guilty; and we are therefore prepared to proceed to a catalogue and definition of those offences, against which our laws denounce punishment.

* 2 *St. L.* 803, 4. 4 *Comm.* 39:

No. VIII.

Observations on the Duty of a Grand Jury.

YOU have been just sworn to the exercise of a very important part of the administration of public justice, and now stand in the middle between the citizen and the laws, as the safeguard of both.

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The first consideration to be impressed on your mind is that this is a public office of the utmost concern to the fortune, good name, and life, of your fellow citizens,

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and to the peace and government of the state ; that it is respectable, in proportion to its importance ; and honourable, as a gratuitous exercise of part of the sovereign power. It lies with you, to suffer the public laws to be violated with impunity, or to support them with dignity and reverence. It lies with you, to bring the criminal to justice, or to screen him from animadversion. It lies with you, to protect and justify the innocent man from false suspicions, or to yield him up to oppression, and the prejudice and rage of the day. And, without impiety, to use an allusion to divine omnipotence, under the controul of God, the laws, and your own consciences, " the issues of life and death are in your hands."

This consideration of the importance and dignity of the duty, which you have now undertaken, is, of itself, sufficient to awaken your utmost attention to the conscientious discharge of it, to swell your sense of the weight and value of your present office, and, in your feelings, to furnish you with a standard, by which to measure your actions in this public capacity. To this sacred tie of honour and public duty, is superadded the solemn obligation of religion : you have, by oath, appealed to the Supreme Being, to judge of the integrity of your deliberations and presentments ; and this trust is one of those, of which you must give an account, at the great day.

Such is the nature of your present office, that it is not thought safe, to delegate its powers to any particular person, or permanent body of men ; but only to a jury, a just representation of the people themselves, impartially collected, and frequently changed. For, even to an impartial representation of the people, this power is intrusted, only occasionally, and for a short period.

The rule of your enquiries is *what is true, and what is lawful*. Of the truth of any fact alledged, you are the sole and exclusive judges, on the evidence before you ; and, in this, may exercise your official discretion, governed only by your conscience and duty. Thus are ye to establish your belief, and, according to your belief, are ye to find and report the facts alledged against any of your fellow citizens. You are not bound to declare any thing true, because it is positively sworn to, if, from the character of the witnesses, or the ground

on which they viewed the object, and formed their opinion, or from the circumstances attending the transaction, you have reason to believe, that it is false. The truth of facts, and the credibility of witnesses, are wholly in your hands.

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But if you *believe* the facts alledged, your opinion whether they are *lawful* or not, is not arbitrary, or in your own power ; but is subject to the judgment of the court, under whose direction you act. Viewing courts as the proper organs of the law, you ought to receive their opinions, on what is lawful or unlawful, with that deference, which is due to constitutional authority, and professional knowledge.

The consequences of a crime, either to the offender or to others, whether the law has provided for it a proper punishment, or whether the offence be popular or not, are no considerations of yours. These belong only to courts, to the executive authority, having a power to pardon, and to the legislature. You have only to enquire, whether the person accused has committed the offence, of which he is accused. If you have reason to believe, that he has, you are bound, by your duty to say so, whatever the consequences to him may be. I have known a grand jury refuse to find a bill, because they thought the offender sufficiently punished, by his previous imprisonment. Was not this usurping the power of the court, and of the supreme executive magistrate, and taking upon them to declare the fact no offence, or to grant a pardon ? Every man in office ought carefully to keep himself within the bounds of his constitutional authority ; and juries, a selection of the people themselves, ought to beware of encouraging, by their example, official usurpation. Truth and law ought solely and entirely to govern your determinations.

As to the jury only, it belongs, to determine what witnesses, it is proper to believe ; to the court only, it belongs, to determine what witnesses, it is proper that the jury should hear. The jury therefore ought to hear no witnesses, who are not sent to them under the sanction of the court ; and witnesses are sworn by the court, or some judge thereof, before they are sent to the jury, to give testimony. But sometimes you will find men,

June Sess. who have so little sense of duty, regard for the constitution of their country, or respect for the office and character of a juror, that, when any question, in which they are interested, is before a grand jury, they will mix with jurors out of doors, enter into conversation with them, or in their hearing, about the matter under examination, insinuate or declare what they wish believed, and endeavour to influence the judgment, and even solicit the votes of the jurors, in favour of the side they take. Such men are corrupters of judicial integrity, and traitors to the laws of their country; and an honest juror, collecting a sense of the dignity, importance, and trust, of his situation, will address them thus:—"Begone, deceivers, you must have some bad end in view; for if what you say were true, and proper for me to hear, you would come forward as witnesses, and give your sentiments on oath, in the presence of the whole jury: it is in this manner only, that my office will permit me to receive information." It is a good rule for the conduct of jurors, to listen to no conversation, whatever, out of doors, on any subject before the jury; never to speak of it themselves, but in full jury; and to avoid all, who would lead them into any conversation on such subject. And to me it appears, that their duty and oath bind them to such reserve, and that a sense of their dignity will lead them to a full practice of it.

It seems superfluous to say, that a juror must be no respecter of persons; that, in judgment, he must know nobody, but decide alike of friends and foes.

Reflect on the dignity and importance of your present station, acting on the laws, liberties, and privileges of your country, and let your conduct be regulated by the impartiality and independence corresponding to such sentiments. You are to consider yourselves as the guardians of the laws, and of the rights of your fellow citizens, and bound, carefully to preserve both from injury or encroachment. No considerations ought to induce you, to omit presenting every offence known or proved to you; and no considerations ought to induce you, to sanction a charge, for which there is not a ground of belief. To say nothing of your own guilt, in violating your oath and duty; overlooking offences will

render breaches of the law common, defeat the ends of justice and laws, relax the authority of government, and introduce general corruption and violence. Hastily to sanction unfounded accusations, renders you instruments of oppression, and converts government into a cruel tyranny; a tyranny the more cruel and hopeless, as it is exercised by the people themselves. Truth well ascertained, and law impartially administered, ought to be your present aim and pursuit.

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As your office is but temporary, and you will soon descend from it into the common rank of citizens; let me exhort you, in the words of scripture, "judge not, that ye be not judged; and do to others, what ye would have others do to you;" still guided by your conscience, your duty, and your oath. As ye would not yourselves be made the object of a false accusation, accuse no man falsely. As ye would not have an injury done to yourselves pass with impunity, suffer no offence against the laws, and any of your fellow citizens to pass with impunity. Use not your present office, as an instrument of malice to your enemies, or as a vehicle of favour to your friends. But let your deliberations be guided by truth and law; and let your conduct in this temporary office be such, as to be spoken of with approbation, and be a model and example to those, who shall succeed you in the discharge of it.

Besides your duty, respecting criminal law, an act of assembly* gives authority to the grand jury, to concur with the county court and commissioners, in directing the building of bridges within the county; and with them and the grand jury, court, and commissioners, of any adjacent county, in directing the building of bridges on a stream dividing the two counties.

A kind of censorial authority is sometimes exercised by the grand jury. Viewing themselves not as the representatives, but as a respectable collection, of the people of the county, they consider it proper to express, in a public manner, their united sentiments of public inconveniences, improvements, or other transactions, measures, or things, of a general nature, and affecting the welfare of the county, or on which it is proper for

* 1 St. L. 283

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1793. their voice to be known ; express praise or blame, according to their nature or tendency ; and suggest or recommend the prosecution of public benefits, and redress of public greivances. In this, they act not in their official capacity ; nor is the exercise of this authority founded on any law. This authority is founded only on use, and a presumed public convenience ; and, when exercised discreetly, it may be attended with good effects. The want of public buildings, for instance, in this county,* appears to me a great inconvenience, and well deserving the animadversion of the grand jury. The want of a gaol (for the present gaol is almost worse than none) renders the execution of criminal law a nuisance to the county.

* *The counties west of the mountains may now vie with any, in decent and commodious public buildings.*

No. IX.

Progress of governments and punishments :—State of punishments in Pennsylvania.

September Sessions.
1793. **T**HE political institutions of the Jews were derived from immediate inspiration from heaven. But that sacred source of instruction is not now open ; and so discordant to ours were the circumstances of the Jews, that their government is no model for our imitation. Like all other works of heaven, it is adapted to them only, for whom it was designed. But the whole world is the empire of the Almighty ; and he governs it by great general laws. These rules and dispensations of providence are fit objects of humble human imitation ; and, in this sense, it may be said, that kings and rulers are the vicegerents of God. In the constitution and course of providence, it may be remarked, such is the wise accommodation of means and ends, that suffering is the natural or necessary attendant of guilt ; and punishment seems rather to result, as a consequence,

from the conduct of the offender, than from any actual *Sept. Sess.*
or immediate interposition of over-ruling authority. 1793.
Human governors have no such controul over the
events of the world, and the feelings of men. But this
they may do. They may establish their punishments on
proper principles, and direct them to proper ends.

All our knowledge is progressive from small beginnings. Governments in their origin, like the understanding of an infant, are imperfect and erroneous; the mere impulse of the moment, without any comprehensive view or general scheme. Averse to labour, and ignorant of the arts of life, men want those possessions and enjoyments, which incline the mind to peace, and attach it to home. They seek, by hasty violence, what they will not acquire, by patient industry: and their life is a scene of wandering, rapine, and war. In such a state, their mutual danger must unite the force of all, for the safety of all: and, like the several limbs of the body, all the members of the state must be put under the control of one will. Their leader in war becomes their ruler in peace; and the name of *general* is lost in that of *king*. Such, we may suppose, was the origin of royalty.

In this state of society, men accustomed to ferocity, and strangers to feeling and reflection, can be controlled only by violence and severity: and the king, accustomed to the exercise of peremptory, and unconditional authority, punishes disobedience as a personal injury or insult. Hence punishments are instituted and inflicted with a view only to gratify the passions of the despot, and rouse and alarm the coarse feelings of the slave.

But industry and arts, in proportion as they multiply the possessions and enjoyments of men, soften their manners, and incline them to peace. With peace and sober industry, their numbers increase. In proportion to their numbers, is the variety of their pursuits; and, by study and experience, their knowledge is extended. A just view of their own interest restrains them from mutual injury, lessens their sense of danger, and establishes a new source of union, concord, and government. As their state becomes peaceful, commercial, and scientific, a warlike leader becomes useless, and controlling authority, in any one man, over these new and various interests,

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becomes invidious and unsafe. Minds enlarged by speculation and experiment call for their natural influence over their own and the combined concerns of the state; and, conscious of their skill and authority, reject the power of one man, to control them. Such, it is natural to believe, is the origin of republics.

In such a state of society, a greater degree of sensibility and reflection will diminish the severity of punishments, or, in other words, punishments less severe will operate more strongly on the mind, to restrain it from offence; the authority of government being divided among many, a vindictive sense of personal injury cannot mingle in the punishment or aggravate the weight of justice; and each man being, as it were, part of the sovereign, the sufferings of an individual will become an object of greater importance.

This natural progress of reason and the course of things, in the administration of justice and of government in general, is frequently, and has been generally, obstructed and perverted. A form of government has been established by accident; from a love of imitation, or an aversion to enquiry, this form is copied by others, as the best; antiquity stamps it with veneration; habit, for such is the nature of the human mind, renders it agreeable; and those who live under it, at last, believe, that it is the only form of government suitable to their circumstances. Thus the free, the varying, and accommodating nature of man is bound in fetters of prejudice, and slumbering hugs its chains; and it is not till some vast commotion, like the revolution in France, has roused it from its sleep of ages, that it starts from its dream, and looks back with disdain at the state from which it has escaped.

The states of America had a peculiar origin. In their infancy, they were men. But unhappily, with the knowledge, they had the prejudices of age. The first emigrants came into America, with the habit of opinion, that the only proper system of government was that which they had experienced in Europe. And if, here and there, existed among them a William Penn, his great and original mind was controlled by the prejudices of his associates, or the authority of the mother country. When the revolution had dissolved the political bands

which connected the colonies with Britain, and given them a separate and equal station among the powers of the earth; reason, as might have been expected, sat down, without restraint, to survey the circumstances of this rising country, and frame a government adapted to its situation. Man, no longer marked by a fictitious scale of degrees, assumed his just rank of political equality. Talents, cultivation, and industry, combining with the varying chances of life, shaped the different stations of each; and established, among all, that gradation of dignity and influence, which results from the operation of faculties and events, and was believed to be more happily supported, by this natural nobility, than by artificial ranks, founded on positive rules, prejudice, and false opinion. A rational system of government was a spectacle to the world. The bigots to established forms viewed it as visionary and unsolid; while the friends of reason and philosophy watched it, as the cradle of their hopes.

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From such a government it was to be expected, that a system of criminal law should be constructed with a mildness adapted to the state of the society and government, the gentleness of manners, the equality of fortune, the facility of subsistence, and the just importance of the citizens; and that punishments would be established on proper principles, and directed to proper ends. From Pennsylvania, especially, this was to be expected, where all those circumstances leading to it, happily prevailed. But man, rational as he is, seems governed by habit; and it is only by gradual experiments, that reformation is effected. A few only, in every age, dare to think it possible, that any other than the present arrangement of things can be productive of good. They suggest the experiment; it is tried with caution; and the world wonders, that it succeeds. The possibility that America could subsist, in a state of independence of Britain, was not more doubted, than that hard labour could, almost in any case, be usefully substituted instead of death.— And it must be confessed, that the first essays of the reformation of the penal law, like many other experiments, hardly corresponded with the sanguine views of the projectors. Not discouraged by a disappointment in this trial of their scheme, and strongly prompted by the just-

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ness of their hopes, and a conviction that principles, essentially connected with reason and humanity, must be practicable and beneficial; the authors of this benevolent plan thought not of abandoning their system, but correcting its errors. These lay in exposing the criminals to the contumely and contagion of public view, and to means and opportunities of escape. To their former measures, they united solitude and secure confinement; and on these principles, keeping it constantly in their view, that the true end of punishment is the prevention of crimes, by the reformation of the criminal, making his punishment, at the same time, an example, and a mean of improvement, they established, under the management of faithful guardians, a system of punishment, which the friends of humanity had exhibited, in theory, as rational and perfect; and, while they desired, hardly cherished a hope, to attain.

Fortunately for the honour of Pennsylvania, the promoters of these principles and experiments possessed a faith in their reality, and enthusiasm for their establishment, which supported them against the doubts of the timid, the prejudices of the obstinate, the scoffs of the insolent, and the arguments of the half-wise. They felt, that their object was truth; and knew, that it must prevail. And fortunately for the honour of Pennsylvania, this state had a legislature, which seconded the views of the projectors, kept pace with their hopes, and gave the force of laws to their arrangements.

On the 15th day of September 1786, an act of assembly changed the punishment of death, for various crimes, and the punishment of whipping,* into servitude of hard labour, for terms varying according to the enormity of the offence; under certain regulations, as to dress, diet, and employment. On the 27th of March, 1789, the errors, which I have stated in this plan, having been discovered by experience, were corrected by a supplementary law, which directed, that the convicts should be confined to labour within the gaol walls; and instituted a variety of regulations, to prevent all improper intercourse, either among the prisoners themselves, or with others; to preserve cleanliness, sobriety, health,

* See also 3 St. L. 120.

Industry, and decorum; to prevent escapes, or even desire to escape; and generally to improve the system. After the close confinement, the most important regulation introduced by this law, and without which the whole would have been ineffectual, was the appointment of six inspectors annually, by the mayor's court of Philadelphia, to superintend the execution of the new system in that city. This regulation, giving the friends of the institution the care of its success, furnished an opportunity of making a fair experiment of its usefulness, and provided guardians for an unfortunate and helpless class of men. Both these laws were repealed, supplied, and improved, by an act passed 5th of April, 1790;* which, adopting the general principles of the former laws, changed all corporal punishment into servitude of hard labour, and laid down a more particular scheme of directions for the custody, management, and employment of the convicts, and vagrants in the gaol of Philadelphia. It directed, that a keeper of that gaol should be annually appointed, by the mayor and two aldermen of that city, and two justices of the peace of that county, with a fixed salary for himself and his assistants, as a full compensation for his services, and in lieu of all fees. And the superintendence of the whole was committed to twelve inspectors, annually appointed, by the mayor, aldermen, and justices aforesaid; and having authority, with the approbation of the mayor and recorder, to make further regulations for the execution of this law. Due separation was established between the prisoners; and the workhouse (the superintendence of which, with the care of furnishing poor debtors there with food, fuel, and blankets, was afterwards committed to the same inspectors†) was converted into a separate prison for debtors, and witnesses in criminal prosecutions.

When I was in Philadelphia, last July, the judges of the high court of errors and appeals were requested by the governor, to visit with him and the inspectors, the gaol of that city. All who had ever seen that gaol, before the late improvements, or who had ever seen any

* 2 State Law 801.

† 3 St. L. 237.

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other gaol in the state, must have received peculiar satisfaction from the general survey of that gaol. We were struck with the general cleanliness, decency, sobriety, industry, and silence interrupted only by the sound of labour. The whole appeared like a well ordered family or manufactory. All were busy. Those who had never known industry were taught it there. The women were employed in spinning, knitting, sewing, washing, &c. The men were employed in carpenter-work, taylor-work, weaving, making shoes, shaving log-wood, picking oakum, sawing stones, &c. Some of either sex, were cooking for their several messes.— All necessary stock, materials, and tools, were furnished them by the keepers and inspectors. A book of accounts was kept by a clerk, or keeper's assistant, in which each prisoner was charged with the price of the materials, tools, food, cloathing, &c. furnished him; and had credit for the value of his work. And we were told, that most of the prisoners had a balance on the books in their favour; and that this balance, whatever it was, at their departure from gaol, would be given to each, with a certificate of his demeanor while confined. If any discover exemplary diligence and propriety of behaviour, and manifest signs of sincere reformation, he is recommended by the inspectors to the governor, for a pardon; and their recommendation never fails of success: nor does the subsequent conduct of the person pardoned, give them reason to repent of their recommendation. The only intermission from labour, except in the necessary hours of refreshment, is on Sunday; which, agreeably to the institutions of religion, and the dictates of reason and morality, is to the prisoners a day of rest, and is improved to the sacred purposes of its institution. An apartment is fitted up, as a small chapel or place of worship, in the gaol, where all the prisoners attend divine service, which is regularly performed by some of the ministers of the city. Such are the happy effects of this improved system, that, not only are there no escapes, but there are hardly any attempts to escape; scarcely is one, who has been under this discipline, found to return; and the number of criminals has been greatly diminished.

One melancholy exception to this general scheme of

improvement we could not avoid observing. A large apartment, for each sex, was crouded with servants and slaves, committed by their masters; sailors, by their captains; soldiers, by their officers; and persons convicted of trespasses and misdemeanors, committed in execution of their sentences. These the inspectors have no authority to compel to work, or to reduce under the general system of management. The consequence is, that they are dirty, idle, and naked. I felt a satisfaction in being informed, that the inspectors had seriously considered this subject, and would call to it the attention of the legislature, by a speedy application for an act of assembly, to regulate commitments of this kind, and the management of persons so committed; and, in general, to bring every prisoner in the gaol under the regulations of the new penal system; which they have experienced to be productive of such happy effects.

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The conduct of the inspectors has so well justified the confidence which has already been placed in them; and this object, which they intend to submit to the legislature, so well deserves attention; that I entertain the strongest hopes, that the improvements to be suggested by the inspectors will receive the sanction of law, and this principal blemish of our reformed plan will be corrected.

The prison for debtors has not that air of cleanliness, and is altogether destitute of that industry, which is the principal ornament of the gaol. This appears another blemish in our system of confinement. Industry is necessary to health, and honourable in every man; and idleness, to a man in gaol, with the means of labour in his power; is peculiarly disgraceful. The patrons of the present system of punishments have, for some time also had it in view, to abolish immediate imprisonment for debt. But, least an absolute abolition should encourage fraudulent concealment of property, their intention is that such concealment be declared an offence, to be prosecuted criminally, and punished by hard labour, under the new regulations.

Such is the present management, with the intended improvements in the gaol of Philadelphia. With respect to the other counties, allowing to them a liberty

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of sending to the Philadelphia gaol all felons sentenced to a servitude of twelve months, or upwards, the law has provided, that malefactors sentenced to hard labor, in any other county than Philadelphia, shall be employed in the several gaols, and work-houses, in such hard and servile labour; and fed and cloathed in the manner, prescribed for the Philadelphia gaol. And, for this purpose, the sheriff, with the approbation of the court, is directed to appoint the necessary keepers, whose wages shall be ascertained by the court, and whose duty it shall be, to superintend and direct the labour, cloathing, diet, and lodging of the prisoners, and take care, that they be compelled to labour, and orderly demeanor. The cloathing, food, and materials for labour and manufacture must be provided by the commissioners, to whom the keepers shall account, for the work done by the malefactors.* The courts are also required to make allowance to poor imprisoned debtors, for fuel, blankets, and food.† All expences and charges incurred by these regulations (except for food to the debtors) are to be paid out of the county stock.

When this law was enacted, it was doubted, however desirable, whether it was practicable, to introduce, in the other counties, all the regulations of the gaol in Philadelphia. Indeed the introduction of those regulations, there, was, at first, considered rather as an experiment; but the success has so well justified the most sanguine hopes of its authors, as to operate as a powerful encouragement to the legislature, to extend them whenever the state of population and manufacture can possibly support them. The want of inspectors, which is the principal distinction between the regulations of other gaols and those of the Philadelphia gaol, is, in my opinion, the most easily supplied. I trust, there are, in the several counties, men not inferior to those in Philadelphia, in integrity and public spirit, who would cheerfully engage in so good a cause. And, in my apprehension, whatever regulations may be made, for the management of gaols, there is little prospect of good from them, while gaolers act without any immediate control, or watchful oversight. The performance of his duty, in the safe

* 2 St. L. 811, 3

† 3 St. L. 237.

custody of his prisoners, will enable a gaoler to conceal the neglect or abuse of his authority, from the examination of witnesses. If improper indulgence is allowed to prisoners, they are leagued with the gaoler, to prevent a discovery. If improper severity is exercised towards them, the prisoners, if they even have the means of communication, may be deterred from a discovery, by doubt of want of credit, and apprehensions of rigorous treatment; or be seduced, by a prospect of improper indulgence. And there ought to be, in every county, some confidential persons, with the authority of inspectors, to visit the gaol, when they think fit; with whom the prisoners may have frequent intercourse, and to whom, as their patrons, they may communicate their grievances. Till this provision is made; and the office of gaoler, by a competent salary, is rendered respectable, and an object of attachment; little good is to be expected from punishments in country gaols: for without such provision country gaols will continue to be, as, it is to be feared, they now too generally are, places, not of industry and reformation, but of idleness and corruption.

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Note—Since the preceding charge was delivered, an act of assembly passed, 22d April, 1794, substituted punishment by hard labour, instead of death, in all cases, except murder in the first degree. And in all such cases directed the convicts in every county to be removed to the gaol of Philadelphia.*

* 3 St. L. 599

No. X.

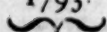
*Laws and Sanctions of God, the State, and the Society.
The Duty of enforcing each of these laws, by the sanctions of Society, Honour and Shame.*

SOCIETY, of course, supposes various relations, with respect to which, man's conduct may be considered as right or wrong. Various laws necessarily arise out of those relations, for the direction of our conduct in each. The relation of all his creatures to the

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Maker of the world is a venerable source of submission and reverence. The laws which regulate our conduct, in this relation, are prescribed to us in the doctrines of revelation, and in those dictates of sound reason, which arise from a serious, accurate, and extensive contemplation of the nature and course of things, the quality and consequence of our actions, and the genuine feelings of our minds. Thus the Gentiles, who have no law, are a law to themselves, and shew the works of the law written on their hearts.* Next to the Sovereign of the universe, our respect and obedience is due to the sovereignty of the nation, in which we live. Its laws are derived either from antient customs, which have prevailed, by general consent, or from express written laws, established by public authority. There is yet a narrower circle of duty, and, though an inferior, a strong obligation, independent of all power, and of all government, but binding on all social beings, and carefully to be cultivated by every man. All animals seem sensible of a duty to aid their own species against the attacks and injuries of any other species. Man, endued with reason, memory, and foresight, enlightened with the accumulated experience of ages, and placed as lord of the inferior world, with that duty to all, which his station suggests and requires, owes a disposition of benevolence to all his fellow men, and actual exertions of usefulness to all within the impression of his character and actions. These sentiments and exertions are prescribed by the circumstances in which we are placed, and the nature, and manners of the society in which we live; and, in their measure, are regulated by the closeness of connection, and necessity of dependence, between us and those who must be affected by our feelings and conduct.—Man's influence is limited; and, like a little water sprinkled over a large surface, it becomes useless, when too widely diffused: to be useful, it must be restrained in its operations and objects. A more warm and steady benevolence and active duty is required of us, to those of our own nation, than to the rest of the world: for they have none other so closely allied; none, on whom they are so immediately dependent; none, whose services

* *Rom. ii. 14, 15.*

can so easily reach them. On the same principles, our benevolence, with respect to those of our own nation, ought to be more warm, steady, and active, towards our own friends and family, than towards others. There we can be most useful, there our services are most required, and there, if our services are not, no services will be bestowed.

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Our actions, as they come within these several laws, and are compared with them, receive different names. With respect to the law of God, they are *sins*, or *duties*. — With respect to the law of the state, they are *offences*, or innocent. And with respect to the law of society, they are *vices*, or *virtues*, or, in a lower grade, follies, or propriety of conduct. Some actions violate all these laws, as murder; others are sometimes considered as violating rather the law of the state, as smuggling; and others only the law of society, as ingratitude. All the laws of God, and of the state, ought to be considered as laws of the society; and every sin, and every offence ought to be holden as a vice: for it is impossible, that the Almighty should ever require a duty useless or unnecessary to our happiness; and it is not to be presumed, that the state would declare that to be an offence, which is not inconsistent with our peace and prosperity. Every feeling or act of duty, towards God and the state, must be, or be presumed, a feeling or act of duty, towards our fellow men.

Each of these laws has its respective sanctions, or rewards and punishments, annexed to it. Those of the law of God are future and invisible. They would therefore make little impression on men, if these qualities were not balanced by their duration and degree: if they are future and invisible, they are eternal and immense. Many of the laws of God have been adopted as laws of the state; and have received, in addition to the unseen sanctions of another world, the visible sanctions of this. Human governments seem to consider fear as the proper motive of obedience: for hardly in any instance, have they established any sanction of reward; but enforce their laws, by punishments only. — Though society, abstracted from government, having no power over the bodies of men, and no existence, as such in the next life, wants those sensible or violent

Dec. Sess. punishments, which the laws of God and of the state
 1793. are capable of inflicting; its laws are not, therefore,
 without sanctions; for they possess those of public
 opinion, honour and shame; sanctions of such vast influence, that they bear up against the terror of both human and divine punishments.

With respect to sins against the law of God, the sanctions are peculiarly in his own hand; to whom vengeance belongeth, and who will repay it. With respect to offences against the law of the state, the sanctions are in the hands of the public officers appointed for that purpose. The duty of individuals requires, that they leave the sword of justice in the hands of the magistrate, and usurp not the public force. As sins against God, considered merely as such, are to be punished by God only, offences against the state, considered as such, are to be punished by the state only, that is, by the officers appointed for that purpose, by public authority. As those persecutions, which, in the times of ignorance and superstition, under a pretence of the honour of God, were carried on against errors in religious opinions, became no less blasphemous to God, than disgraceful to religion, reason, and humanity; so acts of private unauthorised force, to suppress or punish offences against the state, are dangerous to civil government and the peace of society, and disgraceful to the citizens concerned. But as the state, or its officers, cannot, like the Almighty, discern all the secret or open actions of men, much less their thoughts or intentions, it becomes the duty of every citizen to serve as eyes to the state, to watch over the actions of their fellow citizens, give information of all offences to the proper officer, and secure offenders for the punishment of the law. For though, in the execution of public justice, the duty of a magistrate or officer is trusted but to some; the duty of a witness, and the duty of aiding public authority, is imposed upon all: and the citizen, who conceals offences against the state from the knowledge of those, to whom prosecution or punishment belongs; or who assists an offender to escape, or neglects proper measures, to render him amenable to justice, saps the foundation of public authority, and contributes to disorder, and disobedience to the laws.

This duty of a citizen was prudently and effectually secured, by the antient Saxon police, instituted by Alfred, when, in dividing and subdividing the kingdom of England, he ordered every man (on pain of being imprisoned, as an offender or a suspected person, till he found pledges for his good behaviour) to enrol himself into some one of the inferior divisions, decennaries, or tithings; and made all the inhabitants of each decennary mutual sureties for the good behaviour of each*. Thus, by combining public and private interest, he promoted obedience to the laws, and secured the testimony and force of every man, in aid of public authority. Like measures have been adopted in later times, by statutes, which have made the hundred answerable for robberies and riots committed within it†.

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In this manner are the laws of God and of the state protected or avenged. As to the laws of society, those mutual obligations, which, without respect to government, rise out of our situation as men associated together, and prescribe the virtues in that situation; though every such virtue must also be a duty towards God, the author and ruler of the universe, and every vice, contrary to these laws of society, must be a sin against the laws of God; and though virtue is highly beneficial, and vice highly pernicious to every state; yet the state has not thought proper, generally, to enforce such virtues, and punish such vices, by its sanctions; but leaves society to avenge its own cause. Want of generosity, charity, candour, and many other virtues, and their opposite vices, are punishable by no law of the state. But fortunately for society, it possesses sanctions, of which it has the uncontrouled disposal, fully sufficient, were they faithfully applied, to enforce all its obligations, and make vice hide its head. The important sanction of public opinion, honour and shame, is left in the hands of the individuals in society, to be distributed according to the merit or demerit of their fellow men.—The state enquires not how they exercise their opinion,

* 1 *Comm.* 114. 1 *Reeve's Eng. Law.* 13.

† *Stat. Wint.* 1 *Geo. I.* c. 5 *iv. Comm.* 246. Perhaps the insurrection in this state, in 1794, indicates a necessity of some such provision here.

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the free exercise of which is their indispenfible right, nor punifhes for the honeft and well founded sentiments or figns of efteem or contempt. Public opinion, good or evil, remains the property of the people individually as members of fociety; and not to the tribunal of government, but to the tribunal of God, of their own confciences, and to this tribunal of public opinion are they anfwerable, for the exercife of this right. But to the tribunal of God, their own confciences, and to this tribunal of public opinion, every man is *ftriely* anfwerable, for the *faithful* exercife of this right; and a judge, or officer of juftice, is not more facredly bound to impartiality and juftice, in diftributing the fannctions of the ftate, to thofe who obey or break its laws; than every individual is bound to impartiality and juftice, in diftributing the fannctions of public opinion, honor and fhame, to thofe who obey or break the laws of fociety, fulfill or omit the duties, which they owe to their fellow men. Were this duty of every individual well underftood, and faithfully praftifed, I know nothing fo effectual, to improve the sentiments and manners of fociety, and to enforce thofe obligations, the neglect of which, though they can be enforced by no law of the ftate, is very pernicious to the virtue and happinefs of its citizens. The fannctions of the laws of God, and of the ftate, will but imperfectly accomplifh their ends; if this, which our maker, and our government, intended and fupposes, as fupplementary to both, continue to be neglected. Let the Almighty threaten, let the ftate decree punifhment, if public efteem do not attend obedience, fhort fighted man will liften to the voice of public opinion*. However finful, however criminal, however vicious; eminence in that, which is moft efteemed by the fociety around us, will be the defire of our hearts, and the purfuit of our lives. If we would, therefore, have the laws of God, and of the ftate, obeyed, we muft make them alfo the laws of our fociety, and enforce them by the fannctions of honour and fhame. Unfortunately,

- * "Yes, I am proud; I muft be proud to fee,
- "Men not afraid of God, afraid of me:
- "Safe from the Bar, the Pulpit, and the Throne,
- "Yet touch'd and fham'd by Ridicule alone."

POPE'S EPIL. TO SATIRES DIAL. ii. ver 208.

these sanctions are not only neglected, but misapplied; and when these are misapplied, the sanctions of God and of the state, threaten and persuade in vain. Has not public opinion, in some places, made it fashionable, to murder a fellow man, or to debauch the wife or daughter of a neighbour or a friend?

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The free exercise, and faithful application, of public opinion, are no less essential to liberty, than to virtue. In all wise, and all free governments, the freedom and impartiality of public opinion will therefore be held sacred; cultivated, with the utmost care; and protected, with the utmost spirit. It opposes a barrier to despotism and vice, which will curb the most oppressive and the basest man, whom nothing else can restrain. History and the press are organs of public opinion, and are, therefore, the terror of tyrants and villains among men. Hence the zeal of the people of China, for their tribunal of history; * and of the people of England, for the freedom of the press.

As the distant and invisible sanctions of the law of God make but a feeble impression on thoughtless men; as the laws of the state do not enforce the peculiar obligations of society; and as these obligations are essential to the happiness of men; it follows, that it must be the duty of every individual, to enforce these obligations, by their proper sanctions, honour and shame. To the obligations of society *especially*; but not to the obligations of society *only*; these sanctions ought to be applied. Our maker intends, and the state supposes, that these sanctions shall be applied, to enforce the laws of the divine and of human government. These sanctions were put into our hands as a public trust, to be exercised for these purposes; and we betray our duty to God, the state, and the society, if we neglect or misapply them. If, conscious of its importance, we seriously and impartially discharge this public duty; if we give our countenance, our praise, and our esteem, to the man whose character is marked with an habitual reverence for the laws of God, obedience to the laws of the state, and observance of the laws of society; if we neglect, condemn, and refuse to honour, the man, whose character is marked with an habitual disregard of these laws; if we deny our

* *Helvetius L'Esprit Disc 3. c. 39.*

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houses, our conversation, and our civilities, to the fraudulent, the ungrateful, the ungenerous, the base, the profane, the indecent, the dissolute, the idle, and those who pursue gain by unworthy, improper, or selfish means, or, in a word, who do not demean themselves as good members of society; there will be no room for vice in the world, if every arm be thus raised against it, and all men make a common cause, to enforce the laws of God, of the state, and of society.

Leaving, however, the consideration of those general duties of every man, at all times, let us now turn our attention to the peculiar duties of our station, at this time. You and we are now here, gentlemen, in the capacity of public officers, called, by the constitution and laws of our government, to enquire, whether any, within this county, have violated the duty, which they owe to the state. For our present authority, as public officers extends only to offences against the laws of the state. Such is the nature and extent of our duty. In the discharge of this duty, it is *our* part, to point out to you, so far as the present occasion may require, what the public laws of the state are; and it is *your* part, to enquire, and report to us, so far as you may know or be informed, by the testimony to be submitted to your examination, whether the conduct of any, within this county has been contrary to such public laws; in order that, on your presentment to us, a more particular and full enquiry may be made, the guilt or innocence of the accused person ascertained, and the public justice of the state vindicated.

No. XI.

Virtue, the end of Government, is best secured by a Democratic form of Government.—Principles resulting from a Democracy.

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VIRTUE, in an enlarged sense, is a disposition and conduct useful to mankind. But, in a sense in which it can be practicably exerted, it is a disposition and conduct useful to the nation or community, in which we live, to all within our reach, and especially to those

with whom we are most closely connected. It seems *March Sessi*
 impossible, that there should be any rational definition 1794.
 of virtue essentially different from this, that it consists
 in useful actions, proceeding from honest principles.—
 Actions hurtful to our fellow men must be vicious: and
 actions useless to them cannot deserve the name of
 virtue.

As the situation of men, in different ages or countries,
 is essentially different; actions, which, abstractly con-
 sidered, are very different, in their nature, must, in dif-
 ferent states of society, receive the same name. And
 the action, which, in one country, is indulged, because
 accommodated to the state of society there, in another,
 is prohibited, because repugnant to the state of society
 there. Nothing can be more different, than the views,
 in which different ages and countries have considered
 the same fact: and actions, not only lawful, but honour-
 able, in one place or time, are criminal in another.—
 Suicide and idolatry were neither disgraceful nor crimi-
 nal, in antient Greece and Rome. In modern Turkey,
 it is unlawful to taste wine; but a man may, at the
 same time, marry several wives, and keep several con-
 cubines. Such is the degree of population in China,
 that (would an European believe it?) the law permits
 parents to expose their infants to perish. In all these
 cases, however, it is the mode only, and not the nature
 of virtue that is changed. A change of dress or com-
 plexion alters not the man. In all its various shapes,
 the nature of virtue is immutable, and its constant ob-
 ject, by whatever actions it endeavours to effect it, is
 public utility.

To produce virtue, or public utility, is the true end
 of government. Virtue is most effectually produced,
 by making it the interest of each individual, to promote
 the public good. That form of government must be
 good, which necessarily combines the individual, with
 the general, interest; and that form of government must
 be bad, which necessarily disjoins them. That therefore
 must be the best form of government, which most ef-
 fectually and inseparably combines and unites the gen-
 eral and individual interest: and this is most effectually
 done, in a democratic republic.

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In a monarchy, where a single person has the disposal of all power, authority, and benefits, the interest of every individual leads him to accommodate his manners and conduct to the will and interest of the monarch only; for, from him only, can he have hopes or fears. All tempers and actions will be wholly submitted to his pleasure. Habitual servility and baseness, mutual distrust and treachery, indolence and ignorance, will form the national character: and the description of it will be simple and short; one tyrant, and many slaves. The interest of himself, and the interest of the monarch will be the only objects pursued, by each individual. A disposition to public utility, a pursuit of public good, in other words, the love and practice of virtue, may become unnatural, because useless and dangerous: useless, because it will procure no advantage to the individual, whose state, fortune, and happiness, depend solely on the monarch: dangerous, because odious to this monarch, from whose power (which consists in others having none) it is derogatory. The duty, therefore, which his own interest and preservation requires, from a subject of this government, is submission to the will of the monarch, a constant pursuit of his single interest, and a careful avoidance of every thing, which, promoting the public utility, must abridge the power of the monarch. It is thus rendered impossible for a slave to be virtuous: and the unfortunate man, who should make the attempt, would soon find his endeavours crushed, by the power of the monarch, and the depravity of his fellow slaves.

In like manner, in an aristocracy, where all power is vested in a few; the interest of each of their subjects, is, to promote the interest of the rulers, from whom only the subjects have any hopes or fears. In this form of government, also, to promote the general interest is, to oppose and lessen the power of those, on whom the state, fortune, and happiness of each individual depend. The picture and character of the nation is here nearly the same. You see here a few tyrants, and many slaves. There is no inducement and every danger, to virtue.—To be safe, you must be vicious, or have no character at all. And the only prospect of relief, to the miserable people, is, that the mutual envy, enmity, or fear of the tyrants, may lead some of them, for their own support,

to raise the people to a capacity, to vindicate their general rights, and annihilate the power of their masters. *March Sess.*

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In these forms of government, the sovereign and the people, the power, and those, for whose benefit the power is established, are different and adverse. The sacred rule, that the safety of the people is the supreme law, is perverted into a maxim, as noxious to virtue, as it is firmly established, and incessantly pursued, that the safety of the rulers is the supreme law. In proportion, therefore, as the rulers are few, the inducement to virtue is diminished. To multiply motives to virtue, you must multiply those, in whose hands power is lodged, and, in consequence, on whom the state, fortune, and happiness of each individual depend. And when you have made the power and the people, the rulers and the ruled, one; you have taken the best measures, to promote virtue, that is, to promote public utility.

The best form of government, therefore, or the government most favourable to virtue, is a democratic republic. Here all power being vested in the whole people; the whole people become the source of the hopes, prosperity, and happiness of every individual; and, therefore, the interest of every individual leads him, to promote the interest of the whole people. The general and individual interest is thus effectually and inseparably combined and united. To be generally useful, is the way to general favour; general favour is the way to general power; and general power is a mean of enjoyment, and therefore, an object of desire, and a motive of action to every individual. Thus every individual is compelled to be virtuous, that is, to be useful.

The whole nation, under this form of government, presents a picture and character very different from those already stated. The freedom of the government displays itself in the sentiments, the manners, and the conduct of every citizen. There being no individual, or junto, to whose power and direction the demeanor of all must be accommodated, an unrestrained variety of character is exhibited; a general manly independence prevails; a consciousness of power gives a dignity to every citizen; and it may be said of the whole nation, as the ambassadors of Pyrrhus said of the Roman senate, that it appears a nation of kings.

March Sess. Such, in the abstract, (for this is all matter of speculation) and allowing for the variation of all principles in practice, is the nature of the several forms of government, and their influence on manners and virtue. In the various combinations of each, according as the worst or the best form is mingled and prevails, the influence is corrupted or improved.

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Our government, happily for us, is of the last and best kind; a democratic republic; but, like all democracies of any considerable extent, in a representative form. All power is in the people: but, as it is impossible, that the people should exercise it personally, they exercise it by their deputies. Even in the smallest districts or corporations, it is found impossible for the inhabitants, to transact personally, the common business; and it becomes necessary, to divide it into portions, and intrust it to the management of certain individuals appointed to each. More necessary must this be, in extensive and populous republics. Were all the people to assemble, to make laws, it would be impossible to collect the general will. This duty, therefore, is intrusted to deputies, chosen in districts not smaller than convenience of assembling requires.—Both for safety and convenience, the power of executing the laws, is, in various forms, intrusted to other deputies, chosen in the same manner, or with different modifications, and with authority limited or extensive, as the nature of their duty, for the public good, seems to require.

Still, however, all power is in the people; though, because they cannot exercise it personally, they have intrusted the exercise of it to deputies, appointed from themselves. All these deputies or officers are but the representatives or agents of the people: the mouths, by which the people speak; the hands, by which the people act. The people prescribe and limit their authority.—The people appoint them.—The people call them to account.—The people remove them. But the people exercise these powers over their officers, by agents, or according to certain rules, which they have established for themselves; and, while these rules subsist, can exercise these powers in no other way. For to encourage their officers freely to accept, and faithfully to discharge the duties of their trust; the people, for the public good,

vest their officers with a stated tenure in their offices, *March Sess.* that they may not be the slaves of power, or the sport of caprice, and so incapable of a proper exercise of their duty. But the people is the source of all power. The people *will*, the people *do*, every thing: though, to express their will, or exert their force, they do not rise in a body; but speak by the mouth, and act by the hand, of deputies. To elect these deputies, the people, at times, rise in a body; and all speak by their own mouths.— At such times, they are, if I may adopt an expression of a nation labouring in the cause of democracy, a “primary” democracy; yet, however, of a federate kind, because all the people cannot assemble in one place. On all other occasions, they are a representative democracy.

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The following principles seem to result from this form of government.

1. The people, in whom all power is vested, is the whole people. And, because it cannot be supposed, that the whole people, should, like a jury, or a Polish diet, agree in every measure; necessity of decision requires, that, where the whole do not agree, the will of a majority should be considered as the will of the whole: and that the whole should be considered as present, where the whole ought to be present. But any number of individuals, less than a majority of the whole nation, has no right to call themselves *the people*, or demand or expect, in any general measure, that their opinions should be received with submission, or have any binding force.

2. On the supposition that the people ought not to trust to any deputies, to do that, which consistently with public convenience, and the public good, they can do themselves; it has been said that the people ought, themselves, to choose all those deputies, whom they empower to make laws. But this, like all other abstract principles, must yield to experience, and be followed only so far as it promotes public convenience and the public good. The passions of the people are often the greatest enemies to their interests and liberties.

3. Where the people have intrusted deputies or public officers, with the exercise of an authority, they ought not to restrain, overawe, or influence those deputies in

March Seff. the exercise of such authority, to the extent in which
 1794. they have been intrusted; but leaving them free, in
 this extent, reserve the power of public punishment,
 rejection, or contempt for its abuse.

4. Though the deputies of the people, or public officers, ought always to consider themselves, as the *responsible* agents of the people; they ought always to consider themselves as the *free* agents of the people; free, within the extent of their authority; and responsible only for its abuse. They ought to believe, that the authority vested in them, by the people, was vested in them, for the good of the people; or it would not have been vested in them, by the people: and believing this, they ought to exert it, to the extent in which it is vested, wherever they believe, that the public good requires, that it should be so exerted. They ought to consider it as a sacred deposit in their hands, to be faithfully used, for the purposes, for which it was bestowed. And they ought to consider themselves equally criminal, and traitors to the constitution, if, on any proper occasion, they neglect to exert their authority, to the extent in which it was delegated, as if they exerted it beyond this extent, or usurped authority not delegated, or endeavoured to restrain the people in the exercise of power reserved to themselves. The officer betrays his trust, deserts his post, and commits a crime against public liberty, and public virtue; who bends his authority to the fluctuating humours of the people, or the fixed prejudices or opinions of those among whom he lives. And he is not a good officer, whose end is to do what is pleasing: but he only is a good officer, whose end is to do what is useful, and whose means are lawful, convenient, and effectual, for this end. Therefore, the proper temper of an officer, the temper proper for the promotion of public liberty and virtue, is not a temper of compliance, but an intelligent, upright, and manly, pursuit of general good, by lawful authority.

5. When the deputies of the people, public officers, or, as the French name them, the constituted authorities, acting within their legal powers, have expressed their will, determination, or act; it ought to be considered as the will, determination, or act, of the people, not to be contradicted or opposed, but by some other constitutional

authority, stronger than it. If it be not contradicted by a constitutional authority, stronger than it; it must be presumed, that it is the will of the people, that it be not contradicted. What has been legally done, must be considered as rightly done; and public liberty, virtue, and peace, require, that it be submitted to: for no principle is more dangerous, in a democracy, than this, that any number of individuals, less than a majority, should control the whole. The will of the public officer, constitutionally expressed, must, therefore, be considered as the will of the nation. And against the will of the nation, no individual ought to set up his will: and, if, against it, no individual ought to set up his will, no number of individuals, less than a majority, ought to set up their will, against it: for, if one individual, or any number of individuals, less than a majority, may set up his or their will, against the express or implied will of the nation, then every other individual, or every other number of individuals, less than a majority, may set up his or their will, against the express or implied will of the nation; and, instead of peace and liberty, there would be violence and anarchy, the worst of all political evils: for violence in one is better than violence in all; and any government is better than none.

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Its tendency to anarchy being the principal objection urged against a democratic government, it is incumbent on a free people, to evince, in experience, that this objection is ill founded; that anarchy has no necessary connection with democracy; that freemen can respect the authority, which they constitute for themselves, more perfectly than slaves, that which is imposed upon them; and that the obedience, which springs from free will, is more uniform and sincere, than that which is extorted by force. By doing this, all the ends of government, liberty, and justice, are secured: and these can only be secured, by combining power in the people, with efficacy in their officers.

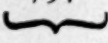
6. Though the people have intrusted their officers with the exercise of their power; they ought still to remember, that the government is theirs; and that their honour, interest, happiness, and peace, depend on the due administration of all its branches. Every individual ought therefore, to consider, that, though, for his own,

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1794.  and for the public good, he is restrained from opposing the officers of the public, in the legal exercise of their authority; yet, for his own, and for the public good, he is bound to support and assist them, in the legal exercise of their authority. Every individual ought to consider, that it is his authority, that public officers are carrying into execution, and that he is bound, in interest, honour, and duty, to support and assist it. Every individual ought to consider, that public officers cannot do every thing, necessary, in the administration of government, to be done; and that there are many occasions, on which, the private arm must be extended to aid the public, or justice and government must cease. Every individual ought to consider, that the pursuit and promotion of virtue is an indispensable duty; that virtue is general good; that general good cannot be promoted, without a faithful execution of public authority; and that public authority cannot be executed, without the aid of individual exertions.

7. If it be, therefore, the duty of every individual citizen, to support and assist the due execution of the laws; more especially is it the peculiar duty of those, who, like you, gentlemen, are occasionally called out, in the capacity of public officers, and bound, by oath, to the discharge of this public trust.

No. XII.

Necessity of Submission to the Excise Law.

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THE alarming and awful situation of this country, at this time, is too well known to require a statement. On the part of government, we are now offered a forgiveness of all that is past, on condition, that we sincerely submit to the excise law, and all other laws. The question now is, whether we will submit to the terms proposed, or not.

The decision of this question is of such importance, that I am sure it will receive a solemn consideration,

from every citizen of a sober mind. If we accept the terms, we shall have *peace*. If we reject them, we shall have *war*. There is no *medium* between these extremes. For, in the present state of this country, it is impossible to expect, from government, a repeal of the excise law. Government is the *whole* people, acting by their representatives. The will of those representatives must not be extorted by force or fear; otherwise, those, who thus constrain them, exercise a tyranny over the rest of the people. We are little more than a seventieth part of the United States. We ought not, therefore, to pretend to dictate laws to the whole. But whatever portion we may be of the people, if one law is repealed, at the call of armed men, government is destroyed: no law will have any force: every law will be disobeyed, in some part of the union. Government is, therefore, now compelled to enforce submission to *this* law, or to *none*. The whole force of the United States must be exerted, to support its authority now; or the government of the United States must cease to exist. *Submission*, or *war*, therefore is the alternative.

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War is so dreadful a calamity, that nothing can justify its admission, but an evil, against which no other remedy remains. That the colonies, to relieve themselves from the tyranny of Britain, should have roused to war, no man will wonder. They had to acquire the first principles of liberty, an equal voice in framing their laws. The same was the case of France. Its constitution was overthrown; and one man had, by inheritance, acquired a power, which he could transmit to his successor, of making laws for the whole nation. But our constitution has already secured the most democratic principles of representation. Our complaint is against the ordinary exercise of legislation. *We* have now more than a just proportion of representatives.* To fill our just proportion, we may choose whom we please. And we ought not yet to despair, that, in a legal manner, we shall receive redress, for every just complaint. The principles of liberty are completely established in our

* One senator and three representatives in Congress, from these counties.

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constitution. Those principles are, that the will of a majority should control the few. We wish now for a liberty destructive of those principles, which we formerly fought, and the French now fight, to establish. Our complaint is, that the *many* have not *yet* repealed a law, at the request of the few, and, therefore, we rashly propose war.

If we determine on *war*, look forward to the consequences. Either we shall *defeat* the United States, or the United States will *subdue* us. If the United States subdue us; we shall, at the end of the war, be, certainly, not in a better situation, than we are in at present; for the same necessity, the preservation of the authority of government, will exist, for enforcing the law *then*; which exists, for enforcing it *now*. We shall be in a worse situation; for government will then be under no obligation to grant us the favourable terms, which are now offered; but may exact punishment, for past offences; penalties, for past delinquencies; compensation, for past damages; and re-imbursment of the expences of the war. To these I might add the miseries attending the war. But as these will attend the war, in either event, I shall particularly allude to them, in the supposition of our defeating the United States.

To me, this event appears improbable, in the last degree. A train of unfortunate delusions (for such I deem them) seems to occupy the minds of many in this country. It is said, that no militia will come out against us; that, if they do, we are so much superior in arms, that we shall easily defeat them; that we can intercept them, in the mountains, and prevent their passage; that, if they should come, they will march peaceably along, and not disturb the citizen engaged in the lawful occupations of life; and that, at the worst, we can throw ourselves under the protection of Britain.

On such notions, these are my remarks.—From all that I have heard or seen, there is a resentment in the people of the other side of the mountains, against our conduct, on two grounds; as being contradictory to the principles of democracy, which require obedience to a constitutional law; and as refusing to bear *any* part of a burden, to which they have submitted. This resentment will not only carry *vast numbers* of them, to comply

with the regular call of the militia, but to step forward, as volunteers. Supposing (which may yet be doubted) that they may, at first, be inferior to us, in the art of fighting; the interests of the United States are so deeply involved in our submission, that no expence will be spared, to accomplish it. And, should the draught of the militia be insufficient, certainly the legislature will enable the executive, to raise and maintain a standing body of forces, to accomplish the object of government. They will come, at different times, and in different directions, and accumulated numbers: for the "whole force" of the United States will be directed against us: so has the president, who never speaks, till he has determined, declared, by his proclamation. If this country reject the conditions offered, the whole country will be considered as in a state of rebellion: every man must be considered either as a citizen, or as an enemy. If he say, he is a citizen, he may be called upon, by the authority of government, to assist its force, in subduing its enemies. If he refuse, he becomes an enemy, and may be treated as such. The army of government may live among us at free quarters, and reduce us to obedience, by plunder, fire, and sword. Will the British receive us? The government of Canada dare not, without authority from London. And it is not to be supposed, that Britain will risk the loss of the friendship and trade of the United States, for so poor an object, as our becoming her subjects. If she did, might we not expect, that the United States would seize her dominions on the eastern part of Canada and Nova-Scotia, and intercept our communication with her. Against the "whole force" of the United States, exerted as we have reason to fear, what have we to rest on? Where are our arms? Where are our magazines of military stores? Or where can we obtain a supply of these articles, but from the United States, with whom we shall be at war? All communication between us, and our fellow citizens on the east side of the mountains, will be cut off. Even the supplies of the common articles of life, which we receive from them, will be prevented: and not a single article of food or cloathing, much less of arms or ammunition, will be furnished to us, from that quarter. Army after

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1794. army, will be sent against us. In a state of open war, we shall be considered as any other enemy, with the additional rancour attached to a civil war. Our agriculture will be destroyed; our fields laid waste; our houses burnt; and, while we are fighting our fellow citizens, on one side, the Indians (and God knows how soon) will attack us on the other. The consciences of many, among ourselves, will shrink back with horror, at the idea of drawing a sword against our brethren! They will call for neutrality. They will enter into associations for mutual defence. Many, who, now, from fear of danger or insult, put on the appearance of zeal and violence, will, when it comes to decisive exertion, draw back. But those, who are for war, will strive, by force, to draw in those, who are for peace. We shall attack and destroy each other; and fall by our own hands. Our corn-fields will be converted into fields of battle. No man will sow, for no man will be sure, that he shall reap. Poverty, distress, and famine, will extinguish us. All mutual confidence will be at an end, and all the bands of society will be dissolved. Every man will be afraid to speak to his neighbour. There will be no power of government, to control the violence of the wicked. No man's life, no man's house, no man's goods, no man's wife, no man's daughter will be safe. A scene of general destruction will take place. And should government, weary of chastising us, at last leave us to ourselves; we shall be a miserable remnant, without wealth, commerce, or virtue; a prey to the savages, or slaves to Britain.

Are we prepared for a separation from the United States, and to exist as an independent people? This is a question, which ought to be settled previously to our taking up arms against government. For, to disobey government, while, by remaining in it, we admit its authority to command, is too absurd, and too contrary to the duty of citizens, for any man of reason and virtue to maintain; especially where that government, like ours, is created and changeable by the people themselves, that is, by the *whole* people, or a majority of the *whole* people. Our appeal to arms is, therefore, a declaration of independence, and must issue either in separation or submission. Government cannot recede farther than it has done. It has already made sacrifices, which intitle

it to grateful returns. It offers to forgive past offences, *Sept. Sess.*
 and consider us as having never erred. It cannot, with- 1794.
 out a total extinction of all authority, repeal this law, -----
 while we resist it. Government must either subdue us,
 or cast us off. For, however we may flatter ourselves
 with the destructive hope of *defeating* government, we
 can have no prospect of *subduing* it, and compelling the
 United States to retain us in the Union. Suppose us,
 then, a separate people, what prospect have we of being
 able to secure those objects, which are essential to the
 prosperity of this country, and of far more consequence,
 than the repeal of the excise law? Shall we, at our own
 expence, subdue the Indians, seize the Western posts, and
 open the Mississippi? Or will not the British, counte-
 nanced by the United States, retain the posts, and arm
 and protect the Indians against us? And will not the
 Spaniards, under the same countenance, block up the
 Mississippi, and refuse, perhaps, all trade with us? At
 present, there is a fair prospect of an accommodation
 with Britain, and, by the influence of the United States,
 we have reason to hope for a surrender of the Western
 posts, and, of consequence, a peace with the Indians:
 There is also a negotiation, industriously, and not un-
 promisingly, conducted, with Spain, for the free navi-
 gation of the Mississippi. The continuance of our union
 with the United States may, therefore, in a short time,
 secure us all our favourite objects. And there must be
 time: for we have to deal with sovereign and powerful
 nations, whose rights we cannot infringe: we must
 therefore solicit, and not extort. But separated from
 the United States, and, of course, from the friendship of
 France and the world, what hope have we, to bend the
 haughty nations of Britain and Spain. We should be
 their sport, or their slaves.

In rejecting the conditions now offered us by govern-
 ment, we cannot hope to extort a repeal of the excise
 law. If we would remove it by force, we must be able
 to cut ourselves off from the United States, with the
 loss of our prosperity, our happiness, and perhaps our
 existence. A rejection of the conditions is a declaration
 of war, and war is the sure road to ruin.

Let us next consider what will be the consequence
 of our submission to government, on the terms offered.

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We are restored to the peace and protection of government. We shall be tried, for offences or delinquencies, by courts and juries in our neighbourhood. But, with these favourable terms, we must submit to the excise law.

The peculiar objection, which lay in the mouths of the people on this side of the mountains, to this law, was this: that from our local circumstances, it drew from us a sum of money, which was disproportioned to our wealth, and would soon exhaust our circulating medium. However necessary, on these grounds, an opposition to the excise law might be, three years ago; it is *less* necessary now. Since that period, the progress of this country to wealth has been amazingly rapid.— There have been more public and private buildings raised, within this period, than for nine years preceding; and fewer sheriff's sales for debt, in the whole three, than in any one of the nine. Three years ago, I believe, there was not a burr mill-stone in this country: now there are many. The quantity of money circulating among us is, since, greatly increased, and the value of all property is thereby greatly increased; in other words, the value of money is greatly lessened, and, thereby, the value of the excise to be paid by us, is greatly lessened. *Then* there was hardly any trade to the Spanish settlements on the Mississippi; it was, at any rate, small, and confined to a few adventurers: the quantity of grain exported was but little, of course, but little was withdrawn from our own consumption; and this little was generally bought with goods. Now a very respectable trade is carried on to the Spanish settlements; our traders are treated with great civility by the Spaniards; the duty on our trade is reduced to a mere trifle; and there is very little difficulty in bringing away dollars in return. We shall soon have the whole supply of that market, to ourselves. Last Spring, our best flour was sold there a dollar each barrel dearer, than flour from New-York. None of the traders *now* depend on goods, for the purchase of wheat; but must purchase, at a reasonable price in money. From this increased exportation of our grain, the necessity of distillation is greatly lessened in degree, and will, every day, lessen. Government does not *now*, as *formerly*,

supply the army with whisky, through contractors purchasing with goods; but employs agents to purchase it with money. Last year ten thousand dollars were laid out, in this way, by one agent in this country; and the execution of an order for ten thousand more, was stopt only by the present troubles. The contractors themselves have, these two last years, purchased their supplies with cash. From these circumstances, and the pay and other expences of the army, government sends *far* more money to this side of the mountains, than it can draw back by the excise. At the commencement of this law, a very great quantity of foreign spirits was consumed in this country. But, so heavy is the duty which this law lays on foreign spirits, that the people on the East side of the mountains, drink such spirits at a very increased price, and our store-keepers cannot afford to bring foreign spirits, in any considerable quantity, over the mountains.

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As our circumstances are thus materially changed, so the law itself is changed also. Originally, the duty on a still was sixty cents per gallon; now, it is fifty-four. Originally, the duty on the gallon of whisky was nine cents; now, it is seven cents. Another material alteration is, granting a license by the month, at ten cents per gallon on the still; a provision peculiarly suited to a country, where few distillers work in summer.

I do not say, that, by these alterations in our circumstances, and in the law, our objections to the excise law are *removed*; but they are surely lessened. We have reason also to believe, that our remonstrance would be listened to more effectually, if, by obedience, we put ourselves in a capacity of being heard: but it is natural to answer, "why complain of a law, which you have never obeyed." I will go yet further, and state an opinion, that the easiest, the speediest, and, I believe, the only way, to accomplish our object, a total repeal of this law, is instantly to accept the conditions offered by government, honestly comply with them, and come fairly before the legislature, with our remonstrance.

I have, before, stated the impossibility, that the legislature should repeal this law, so long as we resist it. I will now explain to you, on what grounds I form the opinion, that they will repeal it as soon as possible, after,



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by our submission, we have restored them to their authority; and you may judge for yourselves of the probability of this opinion.

The present prospect of French affairs, and the favourable reception, which Mr. Jay, our ambassador, has met with in England, give reason to hope for a good understanding between us and Britain, and a consequent termination of the Indian war. I estimate two years, as a reasonable period for these causes to operate, and these effects to be produced. If the extraordinary expences of the Indian war ceased, there is reason to expect, such is the increasing trade of America, that the imposts would suffice for the ordinary expences of government. If this be true, so generally is the excise on domestic produce disliked, and so imperfectly paid, that we have no reason to presume, that the legislature will keep it up, longer than it is necessary. You have now the grounds, on which I state the opinion, that it may be repealed in two years. If repealed then, it will have lasted five years; of these five, we shall, perhaps, if we comply now, be compelled to pay for only two years; and, supposing the tax so unequal, paying but two years out of five, may correct the inequality; and, while we pay, a far greater sum, for the expences of the war, is circulated among us. Thus the Indian war, occasioning the excise, bears with it a remedy; and, when this remedy fails, there is reason to expect, the evil may also fail.

Whether, therefore, we would avoid ruin, or whether we would obtain a repeal of the excise law, it appears evident to me, that we have no way to gain our point, but by immediately accepting, and faithfully performing the conditions proposed.

If we do not, we shall no more get cash for our whisky. The army will be supplied with whisky from Kentucky. And regulations will doubtless be made and exerted, to seize and forfeit our whisky, if carried any where out of this country. We shall, therefore, become its only consumers; and it will again cease to be a cash article, and again become a mere drug.

But it is said, that, if we submit now, we have nothing to expect from a remonstrance; for our past remonstrances have been ineffectual. I say, it is too hasty,

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to draw this conclusion. Besides what I have formerly observed, that we have never, by obedience entitled ourselves to relief; I request your attention to the situation of the United States hitherto. The imposts have not been sufficient for the expences of government, including those of the Indian war. The excise law, therefore, could not be repealed, unless some new fund were substituted in its stead. Now, it is impossible, to impose any tax whatever, that will operate equally on all men. Suppose, therefore, some other tax imposed, in lieu of this, while we continued to resist this: What would be the consequence? It might be as unpopular *here*, or in some other place, as this excise; the consequence would be, that, from an experience of the weakness of government, in failing to enforce the excise, the new tax would be resisted also, and *no* tax would ever be enforced.\* Suppose a direct tax, on a general valuation of property; there would be great frauds. Suppose a direct tax on lands. The amount of all direct taxes, in each state, must be in proportion to its number of inhabitants;† now, unless lands, or other property, in quantity and value, bore the same proportion in each state, with the number of inhabitants, to the whole, the direct tax would, in some states, be unconstitutional, and, of course, resisted. I am informed, that in New England, a direct tax would be as unpopular, as the excise is here. Government, therefore, could not, with safety, substitute any other tax, instead of the excise, till it had first shewn, that its authority was sufficient to enforce the excise.

Attend, especially, to the situation of the United States, during the last session of congress, and judge for yourselves; was that a time to release any established subject of taxation, and try a new experiment? The whole world seemed to lower upon us. The Indians attacked our back settlements. The Algerines plundered, and the British captured, our ships at sea. It was judged necessary, for safety and justice, to equip a fleet, to fortify our harbours, and to send out against the Indi-

\* *A direct tax, imposed by a law of Congress, produced, in 1799, an insurrection in Northampton County of this State.*

† *United States Const. I. 2.*

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ans two thousand volunteers from Kentucky. For all these purposes, the imposts (diminished by the spoliations and the embargo) would come too slowly in; and it was found necessary to anticipate the revenue, by enabling the president to borrow a million of dollars. Was this a time to press a repeal of the excise law? From all these circumstances, the failure of our past remonstrances, is no sufficient reason to conclude, that, after we have submitted to the authority of government, and after its embarrassments are removed, our future remonstrances will fail of a just effect.

On all these grounds, I do most earnestly exhort to an immediate acceptance of the conditions offered by the commissioners, and a faithful performance of them, on our part; as the only way, in which we can hope for redress, or escape ruin.

I have thus expressed my sentiments honestly and freely, as, at this crisis, it becomes every man, who has any regard to the welfare of this country, to take every occasion to do. This is not a time for concealment or dissimulation. Let every man speak out; and let us not, by silence or falsehood, deceive one another. Let a free currency of opinions restore mutual confidence, and mutual safety: that the dagger of the assassin, the torch of the incendiary, and the tongue of the slanderer, be not feared. Let the energy of government be restored; let the public peace, and the rights of persons and property, be preserved sacred; and let every individual repose, with confidence and safety, on the protection of the law. Let the power of punishment be exerted only, as our principles prescribe, by courts and juries; let offences be ascertained only by the volumes of our laws; while a man's words and actions are lawful, let his safety be untouched; and let not individuals assume the public duty of repaying vengeance.

Do you, gentlemen, who, by your station can do it so effectually, unite with me in expressing, propagating, and supporting these sentiments; and through you, both now and hereafter, let them be felt to be the voice of your country.

They are mine.—And were an angel from Heaven to charge me, to make to you, as I should answer it at the tribunal of God, a faithful declaration of my opinion



of the interest of this country, at this important period; I would, were it the last moment of my life, address you, as I have now done. And O! may the God of wisdom and peace inspire this people with discernment and virtue, remove from their minds blindness and passion, and save this country from becoming a field of blood.

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*P. S.* [The meeting at Redstone not having given the assurances required by the commissioners, but appointed a committee to obtain better terms; the commissioners changed the terms, to individual subscriptions of assurance by every man, in these counties. When these terms were declared, I exhorted to a compliance with them in the delivery of this charge in the several counties, adapting the expressions to the circumstances. The following paragraphs are as delivered at Washington, 22d September, 1794.]

It may not be amiss to suggest, that, notwithstanding the limited time is expired, it may still be proper, for those who have not signed the form of acknowledgment of submission, yet to sign it before some magistrate. Signing it is no admission of past offence, nor any additional obligation of duty, in any particular person. It is merely that criterion of civil duty, which our fellow citizens have thought proper to require after a general appearance of departure from it. And to this duty we are equally bound, whether we sign or not.

You, gentlemen, are guardians of the public peace of this county. At this time, it is peculiarly incumbent on us, to watch over the preservation of the peace. Notwithstanding the assembling of an army, under the discouraging view of our reluctance to return to our duty, and of our persisting in acts of violence, we may yet perhaps save ourselves from the disgrace and injury of its entering among us, by manifesting to government plain proofs of our submission to its authority, and our firm determination, to preserve the peace. Let us not have it said, that our reformation has been accomplished by fear of an armed force; but from a generous reflection on past error, a sincere sense of duty, and an honorable purpose of recovering the estimable character of good citizens. The people of this country, I always hoped, and still trust, more and more, to be convinced,

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have good sense and virtue, sufficient to entitle them to the respect and good will of their fellow citizens of the United States. One rash step may be obliterated, by an uniform tenor of regular demeanor; and our name may be restored to its due credit. But if we would arrest the threatening hand of government, if we would honourably deserve the character of good citizens, let us now, at this critical moment, watch, with peculiar care, against the least symptoms of violence, outrage, or breach of the peace. Let all tumults, tumultuous assemblies, appearances or words of sedition, be instantly discouraged, suppressed, and, if necessary, brought under the coercion and punishment of the civil authority. This alone can secure to us that peace, which we had lately lost, and preserve us from that fatal anarchy, in which we were lately plunged: for, if civil authority be not supported by ourselves, it must be supported by some other force. This alone can prevent an armed force from entering our country, and exposing our peaceable citizens to the private plunder of troops not inured to discipline, and irritated by our misconduct. This alone can secure to us that pardon and indemnity, which the generosity of government has held out to our former offences, and of which another outrage would certainly deprive us. And this alone can restore to every man among us, that shield of protection against fear and danger, which law and government only can furnish; and make us sit securely in our houses, and sleep soundly in our beds.

In the neighbouring counties, resolutions have been entered into, for preserving the public peace, and supporting the civil authority. In two of the counties, persons uttering inflammatory and threatening expressions have been put in gaol. I trust the county of Washington will be behind none in duty, and love of peace, and will shew itself as respectable in the virtue, as it is in the number of its inhabitants. We may especially expect from all peace officers, justices, sheriffs, and constables, watchful and earnest exertions of their duty and power, for the establishment of peace and tranquility; and from all the well-disposed citizens ready aid and concurrence, in support of the authority of officers, and the maintenance of the happiness, honour, and virtue of this country.

## No. XIII.

*Remarks on the late Insurrection.*

THE late insurrection in this country, from the numbers concerned in it, the manner in which it was conducted, the object it proposed to accomplish, the fatal effects which it produced, and the melancholy prospects which it exhibited; may be considered as the most alarming event, that has occurred in America, for many years. When authority has been encountered with tumult, and laws have been suspended by armed men, when the rage of some citizens has attacked the lives of other citizens, and destroyed their houses and property by fire; every man of a sober mind must be impressed with concern, and seriously consider, to what these things tend.

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That a people struggling against usurped powers, should oppose oppression by violence, or that, in the state of inflammation which is produced by a revolution, occasional outrages should break forth, no man will wonder. But that a people living under a settled and free government of laws, established by their own will, and changeable when, and to what they please; should have recourse to force, to repeal or alter their laws; or to any thing but authority, to redress their grievances; is not less absurd in itself, than destructive to liberty; and will more effectually promote arbitrary power, discredit democracy, and shew the inefficacy of a free representative government, than all the arts and arguments, which its enemies have ever invented.

All governments are liable to change: all have had their changes; for no human art or invention is perpetual. The freedom of the savage state is, by degrees restrained, by the rules which are necessary, to preserve one man, from the force or fraud of another. As wickedness becomes more ingenious or daring restraints are multiplied, or, in other words, the powers of government are enlarged. Every new act of violence in the people becomes an argument for a new accession of force



*Dec. Sess.* to the government, till arbitrary power is gradually  
 1794. vested in one man, as the only remedy, for preserving  
 every man from the injustice of every other. Such *has*  
*been* the progress of governments; and such, by the  
 violence of passions, *may be* the progress of ours.

We profess to admire liberty, and to respect the principles of a democratic republic, as the best source of government; and we consider our own government as founded on those principles. Will we be honest in our profession, and act on the principles which we admire? The principles of a democracy are, that the whole people, either personally, or by their representatives, should have the power of making laws. But what law is it, in which the whole people would concur? So various are the faculties and the interests of men, that unanimity of many, in any measure is seldom to be expected; of a whole people, almost never. If no law were to be made, therefore, till the whole people should assent to it; no law would almost ever be made. But as laws must be made, there is a necessity, that the will of some of the people should be constrained; and reason requires, that the greater number should bind the less. In our government, therefore, the will of the majority is equivalent to the will of the whole, and as such must be obeyed; unless we will avow, that we mean to change or destroy the principles of our government, by violence and terror, and abandoning reason, the principle of action in man, degrade ourselves to the rank of brutes.

To permit or assume a power in any particular part of a state, to defeat or evade a law, is to establish a principle, that every part of a state may make laws for itself, or, in other words, that there shall be no law, no state, and no duty; but a complication of separate societies, acting each according to its pleasure. Those societies will again be subdivided; for a majority, or the whole, of any society, will have no authority, to controul any one refractory member. Each man in the state will be free from all law, but his own will. Government and society are then destroyed; anarchy is established; and the wicked, and the strong, like savages and wild beasts, prey on the whole, and on one another.

Such are the natural and necessary consequences of

opposing a law by force. This opposition, persisted in, must terminate, either in anarchy in the people, or tyranny in the government; and in either case, must terminate in the destruction of those republican principles, which we profess to admire, and are bound to support. If the government yield, one example of successful violence will excite some other part of the people, for some other cause, to pursue the same unwarrantable means, for the attainment of a favourite object. Every law will be opposed, in some quarter, by interested men. Indulgence to some will necessarily beget indulgence to all. There will be no law, the wicked will have no restraint; happiness will no longer exist; mutual jealousy, distrust and terror, will pervade all; thefts, robberies, and murders, will spread over the country; and every man will be the enemy of every other. If the government exert its force, the resistance, which it will experience, and the difficulty, with which it will overcome it, will convince the whole people, or the well disposed, and the greater number, that there is a necessity of abridging the privileges of the citizens, and arming the government with greater power. To repress improper violence in the people, powers, otherwise unnecessary, will be given to the government; and those powers will be increased by every new occasion of violence, till a tyranny is established. And this is the most probable result of tumults, riots, and insurrections. For all good men are instantly impressed with indignation and resentment against them, and disposed to lend their aid to government to punish and restrain them. And, in the choice of anarchy or tyranny, the last, as the least evil, will be preferred.

I hold therefore, that a forcible opposition to law, instead of favouring liberty, is the surest way to destroy it. Is then forcible resistance to law never justifiable? Never; if the law be consistent with the constitution. If a law be not contradictory to the principles of the constitution, however erroneous those principles be, it is entitled to obedience. If a law be bad; let those who dislike it apply, by petition to the legislature, for its repeal. If the legislature refuse, let the petitioners change their representatives. If a law be repugnant to the constitution, the constitution, being the paramount

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authority, silences the law and makes it void. To an unconstitutional law therefore, forcible resistance may be justifiable; but even in this case, it is not prudent; but highly dangerous, because the resister makes it at his peril, and has no other rule but his own opinion, which may be erroneous. For individuals to exercise the right of determining that a law is unconstitutional, is dangerous to themselves and to the peace of the state. And even the exercise of this right by the judiciary (to whom it certainly belongs) may sometimes be invidious, and occasion jealousies and resentments between them and the legislature. In the case of an unconstitutional law, an appeal to the judiciary ought not to be made without necessity; and to individual force never, till all other remedies are exhausted. Thus, according to the genius of our government, opposition even to an unconstitutional law, ought to begin, as opposition to a bad law; by petition to the legislature for its repeal, or by a change of representatives. If those measures fail, the validity of the law must be questioned, examined, and established or annulled, in a court of justice. In this manner it becomes us, as friends to liberty, to seek for every amendment, either of a law or of the constitution, in a peaceable manner; for, to attempt it by force, implies an apprehension, that the alteration attempted will not bear the test of reason, nor receive the approbation of a majority. If either the law or the constitution displease a majority, the majority can alter either. If either the law or the constitution displease a minority, the minority must submit, or retire from the territory of the state. These are the principles of democratic republics. By these principles, if we examine *our* resistance to the excise law, we shall find it as unjustifiable in its nature, as it was outrageous in its degree. A power to lay and collect excises was explicitly vested in congress, by the constitution of the United States. This power received a very full discussion, and deliberate sanction from all the states in their conventions. And four of the states (Massachusetts, South Carolina, New Hampshire, and New-York) to the ratification of the constitution, annexed declarations of their opinion, that congress should not impose direct taxes, unless the amount of the imposts and excises should be insufficient for the



public exigencies. According to the opinion of those states, therefore, congress, instead of being censurable, for not preferring a direct tax to an excise, would have been censurable, if they had imposed a direct tax, till the last extremity.

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All our benefits are mingled with some degree of inconvenience. The union of the states under a general government, while, by combining the whole strength, it renders the states respectable and prosperous, may be truly considered as essential to our safety and happiness, and as one of the greatest political benefits, which we can possess. But it is necessarily attended with this inconvenience, that the laws, which from their nature must be general, will often be less adapted to the circumstances of some states, than of others. The suffering states must seek consolation under this evil, from the principles of mutual concession; and remedy for it, from time, experience, and reciprocal inequality of taxation. If this tax bear peculiarly hard on this country, there may be other taxes, which bear peculiarly hard on other parts of the United States, and affect us but little. I know not whether I ought to reckon of this number, the tax on property sold at auction, the tax on the manufactory of snuff and refined sugar, or the tax on licenses for selling wine or foreign spirits by retail; but of this number, I surely may reckon, so far as it goes, the tax on carriages for the conveyance of persons. If all these taxes do not, the last certainly does, affect others chiefly, and us but little: the last, I may rather say, affects not us at all. They were all imposed in the last session of congress; and if the progress be persisted in, all may correct the inequality of each; or the interests of all combining, for mutual protection, and instructed by observation and experience, may, in time, produce the repeal of all, if a new system, more acceptable in its nature, and more easy in practice, can be introduced. In the mean time, while we murmur at the inconvenience of any law, let us seriously reflect on the difficulty of making laws, equal and acceptable, to so extended and varying a territory, as that of the United States. And, considering the fraternal band, which ties us together, and the source of our laws, from

*Dec. Sess.* the appointment of the whole people; ought we rashly  
 1794. to abandon a confidence, that, as soon as a law is plainly  
 proved, by experience, to be oppressive to us, our brethren will relieve us? Would not we do so to others? And have others less virtue, than we?

Together with these general principles, the particular circumstances of this country press upon us a faithful submission to this law, as a point of conscience, honor, and safety. If we do not *yield*, an armed force will *compel*, a punctual obedience. The law *will* be executed; and let us not render it impossible, for government, to execute it by proper persons. As a public office, become necessary for our honor and safety, let us render its execution respectable, and encourage and protect honest and respectable men in it. We may thus, in some degree, lessen the burden of the law, and render our obedience more pleasant to ourselves.

God forbid, that any man among us should entertain the horrid idea, that secret assassination should accomplish the work, which it is found no longer safe, for open insurrection, to attempt. When danger to its very existence has once roused the power of government, no art or machination, nothing but implicit submission, can restore safety to the aggressor. Even for our own security from each other, such an idea is one of the most dreadful, that can be conceived. Vices, the most daring and detestable need only a plausible introduction, to render them familiar and general. One instance of assassination, of the most odious person among us, would render the life of the most respectable altogether unsafe.—For assassination is the work of a ruffian: and is there any person, whom a ruffian will respect? Cast a moment's reflection on our late troubles, and tell me, what kind of villainy there is, which all at once, did not become fashionable. Chopping off heads was spoken of as easily, as slicing a cucumber; and burning houses became as trivial, as tearing waste paper. Introduce assassination, or any other species of crime, under a plausible pretence, and it will soon spread over the country, and extend to every object.

The late troubles exhibit an awful lesson, which it would be inexcusable to pass over, without attention and improvement. During their existence, the passions

were too much excited, and the mind too little at leisure, to examine thoroughly their nature or effects; and terror debarred the exercise of freedom of opinion and expression. But now, when the storm is over, it becomes our duty, to look back on the past scenes, to contemplate the ruins it made, and speaking of the leading transactions freely and without disguise, to bestow some serious reflections on their nature and tendency. These reflections, while they afford us an opportunity of remarking, how fatal to happiness is a resistance to lawful authority, will shew us also how opposite to liberty anarchy is.

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Some of the plainest dictates of personal liberty, if not its most essential principles, are, that every man be free to think, to speak, and to act, as his inclination and judgment may lead him, provided he offend not against any law; that no man shall be tried or punished, according to the arbitrary will of any individual, but according to the established forms and rules of the law; and that the enjoyment of every man's property shall be secured to him, untill he forfeit it by the sentence of the law, and that sentence be executed by the proper officer. With these maxims, compare the effects of anarchy, as we have experienced it. Because the interest or inclination of some men led them to accept and execute certain offices, established by public authority, lawless bodies of men, assembled for the purpose of riot and violence, seized, insulted, and abused their persons, entered their houses by force, and destroyed both their houses and property by fire. If any thing can place such transactions in a more detestable light, than, at first sight, they must appear, it may be this: that, if these things may be done, for any cause, however good, there needs no more, for their execution, for every cause, than that the party to execute them be of opinion, that the cause is good. Let but a mob assemble, however small it be, if sufficient to accomplish its purpose; let them agree in opinion, that such a man is dangerous, and therefore, that his property ought to be destroyed; and it is instantly done. Let but one man hate another, and resolve to destroy him; he has only to assemble a few of similar sentiments, or over whom he has influence;



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they instantly pretend to be the people ; and the work of malice is accomplished, under the semblance of zeal for the public good.

The outrages of anarchy were not confined to public officers. They extended also to private citizens, of respectable character and inoffensive manners. Variety of opinion seems to be as natural to the human mind, as variety in shape, features, and complexion, is to the human body. Both seem to be the work of our Creator : neither can be a proper cause of punishment ; and to punish, for either, is the grossest tyranny. Actions, which some may think meritorious, others may think detestable ; and a law, which some may think bad, others may think good. But surely no man of sense and virtue will think that any man ought to be punished, for entertaining or expressing either of these opinions, or for acting as if he thought a law good. Yet, for such causes, were men, who had offended against no law, severed from all the attachments of domestic life, driven from their families and homes, it might have been, to wander, they knew not where, and to subsist, they knew not how ; under the fear and peril of death, if they should return. Is this liberty ? Such is the liberty of anarchy.

To a private letter, a sacred respect, somewhat resembling the ancient mysteries of religion, has been usually annexed ; and to violate its secrecy, requires the suspicion of a coward, and the villainy of a traitor. Yet, for no object, that I can perceive, of any public nature, but only to gratify the little revenge of a malignant mind, or to shew, that there was no crime, which we were not ready to perpetrate ; the public post was robbed, and the letters in the mail were opened, by a set of self-created inquisitors, who, advancing from one degree of guilt to a greater, assumed the authority of government, and called out the militia of the country, to share and cover their crimes.

These transactions furnish us with this melancholy instruction, that when men have once transgressed the bounds of civil obligation, and violated public authority, there is afterwards, no restraint to their excess. They will do deeds, which they never before intended, and from which, had they been suggested, they would have shrunk back with horror ; and they will do them, from no motive,

and to no end of interest to themselves or others ; but merely from the rashness of the moment, a folly of wantonness, or an impulse of malice. Let us learn, therefore, to confine our conduct within the strict line of duty, and remember, that the first transgression renders easy every subsequent one, however enormous.

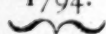
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I will state one or two causes, founded in ignorance and error, which contributed to the late unhappy insurrection, or facilitated its progress.

I shall mention, first, *an opinion, that riots and terror, banishing the officers of excise, would produce a repeal of the excise law, or its inactivity with respect to us ;* but I have said so much of this, on other occasions, that I shall but mention it now, and pass it by, without further notice. I shall next mention, *a desire to cover the guilt of those who first attacked general Nevill's house.* As, it seems, an opinion pretty generally prevailed, that riots in this cause were proper ; it appeared hard, that those who engaged in them, should suffer, for their services in the public cause ; and it seems to have been believed, that the best way, to protect them, was, by multiplying the number of offenders, to make the punishment of any appear dangerous. Perhaps, here, one might find matter for questioning, whether it be not desirable, that wickedness should be accompanied with understanding ; and whether folly be not the most mischievous of all qualities. Had the men who incited the second attack on general Nevill's house, and the subsequent transactions in the insurrection, been men of sound well informed judgment, they would have reasoned in this manner. "The rioters have erred ; but we have countenanced and shared the opinion, from which their error proceeded ; and we ought to endeavour to save them. Let the whole country now rise, and seize and secure them, for public justice. When this is done, let us go forward to government, with solemn and sincere assurances, that we will submit to this law honestly and punctually, and that, if required, we will pay for all past damages and delinquencies : and with these assurances, let us request, that government forgive our offending brethren." If measures of this nature had been pursued, the issue would have been more fortunate, to the offenders, to these counties, and to the United States.

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Another cause, which I shall mention, is, *a mistaken use of the word people*. As, in a democracy, the people is the source of all authority; and as the people on this side of the mountains seemed all to agree, in reprobating the excise law; declaimers, never extending their views beyond their own neighbourhood, but considering the people *here*, as the *whole* people, took occasion to represent, that the people *here* might lawfully correct any errors of their public servants. On these principles, every neighbourhood, considering itself as the people, thought it had a right to do, as it pleased. Assuming, as what needs no proof, that the union of all the states is necessary for the prosperity of each; and that, separate from the union, we should be insignificant and dependent; I would observe, that it is the *whole* people of the Union, that is the source of all power, and that we are but a very small portion of the whole people. And, because the whole people is the source of all power, to argue, that a very small portion of the people is the source of all power, is absurd. If every small portion of the people were to assume the powers of the whole, instead of a government, we should have a chaos of jarring authorities, and conflicting wills. While the constitution subsists, even the whole people can speak only in the constitutional manner, by their representatives. So that the only voice of the people is the laws. And the laws must be presumed to be the will of the people, until the repeal of them declare, that the people have changed their minds.

I shall mention but one other cause, which facilitated the progress of the late insurrection. The danger of this country from Indian incursions, had rendered it often necessary, to assemble the militia, without waiting for the orders of government, which would come too late for the danger. From experience, it was found, that attack was the best defence. Hence voluntary expeditions into the Indian country were frequently undertaken; and government, from a sense of their utility, afterwards sanctioned them, by defraying their expences. In this manner, *it had become habitual with the militia of these counties, to assemble at the call of their officers, without enquiring into the authority or object of the call.* This habit, well known to the contrivers of the rendez-



vous at Braddock's field, rendered the execution of their plan an easy matter. They issued their orders to the officers of the militia, who assembled their men, accustomed to obey orders of this kind, given on the sudden, and without authority. The militia came together, without knowing from whom the orders originated, or for what purpose they met. And, when met, it was easy to communicate, from breast to breast, more or less of the popular phrenzy, till all felt it, or found it prudent to dissemble, and feign that they felt it. This gave appearance, at least, of strength and unanimity to the insurrection, silenced the well disposed, and emboldened ruffians to proceed with audacity, to subsequent outrages, which there was no energy to restrain, nor force to punish.

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In these reflections, we find nothing consolatory: all is sorrow and disgrace. Let us turn then to the other side of the picture, and consider the conduct of government, and of our fellow citizens in other parts of the Union.

A measure, no less prudent than generous, was adopted by the government. Commissioners were sent to offer us a full pardon of all past offences, on the simple condition of future obedience. Lest these terms, offered generously at once, and the best that could be offered, should fail in reclaiming us to duty; the president ordered, that a competent number of our fellow citizens should be ready in arms, to compel that obedience, which reason and mercy could not procure. While the terms were under our consideration, there appeared a manifest reluctance in our fellow citizens, to draw their swords against their brethren. But no sooner was it known, that we rejected those terms, and threatened the government with war and dissolution, than the contest among them was, who should be foremost in the field. It was then no longer a doubt, whether a sufficient number could be procured to go; but whether multitudes, beyond this number, could be persuaded to stay. The merchant abandoned his warehouse, the lawyer his office, the mechanic his shop, the gentleman his pleasures, and every man the gains and enjoyments of domestic life; to endure hardships which they had never experienced before, and hazard their lives in defence of

*Dec. Sess.* the laws. At the call, "your country is in danger," the  
 1794. rich and the poor met together, forgetting all distinctions  
 of station and circumstances, and blended in one common class of patriots. Even the pacific Quaker, whose principles restrain him from shedding blood, now assumed the garb and weapons of war, and marched in arms, to maintain the peace and government of his country.

In this we receive a lesson of the power of government, and are taught, that, however riot and anarchy may triumph for a while, there is an energy and strength in government, to crush them; that reason and the law are the only true protection of free citizens; that violence only brings ruin on its authors; that, in times of sedition, it is the true interest of all, to be, not lukewarm and indifferent, but firm and persevering on the side of public authority; and that the faithful friends of law and order, however borne down, for a time, will, in the end, be protected, and rise above oppression.

Even on this bright prospect, of the generous and spirited conduct of our patriotic fellow citizens, a cloud intervenes. Though none of them fell by our arms, yet some have fallen victims to a change of climate and manner of living, an inclement season, and severity of fatigue, over swamps and mountains. Some gallant youths will never return to their anxious parents. Some parents will never return, to bless their children, in their dying moments. And some husbands have expired, without a wife to close their eyes. Can we think of this, without suspicion, that their blood may be on our heads?

But, gentlemen, the past cannot be recalled: let us only study to improve by it; and strive to make some compensation, by our future conduct. For this purpose, let us suppress the first seeds of sedition and riot, before they grow up as before, to a strength not to be resisted. Let even words, tending to any violence or a breach of the peace, be held criminal. Let every witness of such things carry the offender before a magistrate, that justice may be executed. And let every magistrate take heed, "that he bear not the sword in vain." To permit criminals to escape from punishment, is to encourage crimes. Impunity begets offences, as corruption begets

maggots. A few examples of punishment of the late disorderly, given among ourselves, in each county, will, perhaps, secure our peace, for many years, and prevent the existence of many crimes, and the necessity of many and severe punishments.

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To your particular and serious consideration, gentlemen, do I address these sentiments. You are the door, by which only, justice may be come at. By you, a way may be opened to justice. By you, justice may be shut up. In your hands, the laws of your country have placed this authority; and for the exercise of it strictly, according to law and truth, you are bound by your oaths, and answerable to your God. You have no discretion to do as you please: your opinions must be governed by the laws: your belief must be guided, by testimony; and so you have sworn. It is not for you to determine whether it be *expedient*, that punishment should be inflicted on any particular offender, but only whether it be *true*, that any particular person is an offender.

There are two reasons which ought, particularly at this time, to induce juries, and all other officers concerned in the administration of justice, and all citizens, to discharge their respective duties, with precision, and carry the laws into execution with perfect exactness. An armed force is now in our country, for the purpose of enforcing submission to the laws. The sooner we give satisfactory evidence of our voluntary and exact conformity to the laws, the sooner will our country be cleared of this stain on its character. Further, a law has lately been passed, directing that certain cases, which, formerly, were tried in the federal courts, *may*, now be tried in the state courts; and experiments, under this law, are about to be made. We have now, in many cases, an opportunity of being tried in our own counties, instead of being carried, for trial, to York or Philadelphia. But, if we show any backwardness or bias, in doing justice, we cannot expect, that we should be trusted with its administration, in those cases. Government must require strict justice; and if this cannot be obtained, in our own courts, they will be shunned, as corrupt, and we shall be taken, for trial, to a distance, and have our cases decided by others. If we wish, there-



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fore, to be delivered from a standing army; or if we wish to have trials, in the cases offered to us, in our counties; let us now, at this critical time, give specimens of our being ruled by law. If we do so now, perhaps, after some experience of our virtue, the federal government may trust us, in all cases whatsoever, with trials in our own counties.

I do, therefore, solemnly adjure you, to deal faithfully, and make true presentments, in all cases of any breach of the peace, or other offence, especially respecting the late troubles. This will be the true test of our integrity, and will determine, how far government ought to trust us, with the management of ourselves. Whenever a bill is sent up to you, if it be proved true, I call upon you, as you regard your oaths, and the interest of your country to find it so. Where any offence is within the knowledge of any of you, I call upon you, by the same regard to your oaths and your country, that you present the facts to us, or give information of them to the prosecutor for the state, that he may draw up a bill, to be found on your knowledge.

One offence, which I would recommend to your particular consideration, is *the raising of liberty poles*. What is the liberty, which those pole-raisers wanted? A liberty to be governed by no law; a liberty to destroy every man who differed from them in opinion, or whom they hated; a liberty to do what mischief they pleased. It is not *acts* of violence alone, which constitute offences. Offences may be committed by writings, by words, or by other signs of an evil purpose. The mere act of raising a pole is, in itself, a harmless thing; the question is, what is the meaning of it. Those poles were evidently standards of rebellion, and signs of war against the government. They were raised by the seditious, with an avowed intent, to hold under fear all the well-disposed and peaceable part of the community, to keep alive the spirit of riot and confusion in the country, and to prevent the return of law, peace, and safety. And they produced all the ill effects, which were intended. They gave an opportunity to the violent, to know their strength and one another. What was it but those pole-raising, and their attendant circumstances, that prevented our return to submission and

duty, and a general acquiescence with the terms offered by the commissioners, and made it necessary for government to march an army into this country, to subdue that spirit of sedition and riot, which blind madness first excited, and those pole-raifings kept alive? Will any man doubt, therefore, that raising those poles was criminal, that those were especially criminal, who raised them, after the arrival of the commissioners of government in this country? And those, above all, who raised them, after the generous terms offered by government, were made known.

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Another class of offenders, perhaps yet more atrocious, consists of those, who, by violence or threats, prevented, or endeavoured to prevent, the signing of the acknowledgement of submission required by government, as the condition of our pardon and peace. Besides the fatal effects of this violence to the country, it was a restraint on that freedom of will, which every man has a right to exercise. Was it not a plain breach of the peace?—Was it not a plain declaration of war against government? Need I, gentlemen, use words to convince you, that it was a crime? I know, I need not.

Neither need I tell you, that those men are criminal, and ought to be subjected to prosecution, who took upon them, to burn houses, or abuse property or persons, for supposed misconduct. Those also are criminal, in a high degree, who assembled in parties, for the purpose of doing such things, though they never did them. This is a clear offence, and breach of the peace. It tended also, to keep up the terrors against returning duty, and rendered an army necessary, to remove those terrors, and restore the minds of the people to freedom and ease, and the country to peace.

Let me, in the words of scripture, point out the certain difference, between liberty and licentiousness. "So is the will of God, that you submit to every ordinance of man; as free, and not using your liberty for a cloak of maliciousness, but as the servants of God. For, brethren, ye have been called unto liberty; only use not your liberty for an occasion to the flesh; but, by love, serve one another."\* True liberty, like true religion,

\* 1 Pet. ii. 13, 16. Gal. v. 13.

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is known by its fruits. Liberty, the daughter of Heaven, and the best gift of God, to a favoured people, a generous principle, whose object is the peace and prosperity of the human race, must produce fruits worthy of its divine origin. Licentiousness, the offspring of Hell, and the scourge of an offending nation, selfish, in its nature, and seeking the degradation of all but itself, bears fruits of an opposite kind; sedition, fury, hatred, malice, and mischief. By its fruits, judge, whether our insurrection proceeded from a spirit of liberty, or of licentiousness; whether it was the work of God, or of the Devil.

Do your duty, gentlemen, and satisfy your own consciences. Present all offenders, whatever, to the justice of your country. This you are bound, by your oaths, to do. Whether those offenders shall be considered as proper objects of mercy, or of punishment, it is not for you to decide. That question lies with others; and you cannot, take it up, without violating your oaths, and prostrating the principles of our laws and government.

I shall conclude with exhorting to a speedy and faithful compliance with two propositions, made to us, by the agent of government. One is taking an oath of fidelity, and of submission to the laws; and the other is, entering into an association, for supporting their authority, and protecting their officers.

It may be asked, why should we do so? I will give two reasons.—1st. We have been great offenders: and we cannot give too strong assurances of our return to duty. The assurances required seem due to our own character, and to the satisfaction of our fellow citizens. 2d. A temporary army is now, and a standing army will be established among us; unless we can convince government, and our fellow citizens, by unequivocal proofs, of our regular and sincere habits of submission to law, and of our exertions to enforce obedience to all authority. If we refuse compliance, government, and our fellow citizens, may suspect, that there is a change only in our conduct, not in our hearts; that our submission is temporary and dissembled; and that, if we believed it safe, we would again break out into riots. Let us prevent such suspicions, by our conduct; and, as we have rendered it necessary for government, to establish



a force, to restrain us ; let us render it proper, to withdraw this force. Let us begin, by taking this oath, and entering into this association, and continue in a faithful adherence to both. We may, thus, repair our character, and relieve ourselves from the disgrace of being governed by force, and a standing army.

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## No. XIV.

### *Religion, Society, and Government, necessary for Man.*

TO irrational animals nothing more seems necessary, than the means of preserving existence and health. And to the human species, in a stage of existence, limiting the capacities and desires to the enjoyment of these simplest wants of nature, nothing more seems necessary. But when men have arrived at maturity in condition and power, when exercise, experience, and reflection, have discovered and cultivated those faculties peculiar to our species ; when men have acquired the habit of digesting their knowledge into a system, and abstracting their individual experiences, into general maxims ; when the arts have extended the limited measure of their strength, and speculation has carried their thoughts and reflections from matter to spirit, discovered a distinguishing characteristic of their own, from every inferior species of animals, and displayed a new subject of study and science ; when something, beyond all that our senses can discover, seems to open to the mind, and an immortality to be allotted to the human soul, though the body crumbles into dust ; a new series of powers, duties, and dangers, is unfolded, and, to this new state and prospect of things, new regulations must be adapted.

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All animals pursue a certain line of action. Other animals pursue, submissively, the track pointed out to them by nature, without any sense of merit or demerit. Man has a sense of right and wrong.—Other

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animals appear like machines moved by a regular impulse of nature. Man the Almighty hath endowed with a portion of his own freedom of will, reserved for his moral government, and fitted for immortality. Other animals can express some of their wants and feelings. Man can communicate his experiences, his knowledge, the most abstract thought or imagination. All animals have a sense of pleasure and pain. Man has a sense of honour and shame. All animals may have a consciousness of present existence. Man has a hope of future life. All animals pursue a supply of the wants of the body. But, with these, man pursues a supply of many wants of the mind, many demands of imagination, many claims of futurity; he increases means, without any immediate object, acquires possessions, of which he can have no enjoyment, and accumulates abundance, which he can never exhaust: what he has acquired, he seeks to preserve from the rapacity of others; and endeavouring to multiply his means of happiness, he multiplies the means, by which his happiness may be attacked. Other animals arrive at that measure of dexterity allotted to their species, with little cultivation, and, as it were, spontaneously. Man, designed for a degree of skill of far larger bounds, the extent of which is perhaps not yet ascertained, comes to maturity slowly, with great labour and exertion, and, as it were, by continual force, constraint, exercise, and imitation. Man, a rational, moral, and immortal being, distinguished, by a mind, by a soul, by speech, by, if I may so term it, reflex sensibility, by a desire of property, and by a variety of other characteristics, of a nature altogether different from all other animals, must perceive pointed out to him a life very different from theirs, and a conduct regulated by principles unknown to them, but necessary to his happiness. He must perceive pointed out to him, religion, society, and government.

Even animals, in proportion, as, by sagacity and joint labour, they more or less approach the social and rational nature of man, more or less yield to subordination, and a form of government. It is true, there may be a naked and solitary savage, who excludes from his cave all social communication. Such a being, however, is hard to be conceived, and can seldom exist, but under ex-

treme pressure of necessity, or distemper of imagination. *June Sess.*  
 It is true, there may exist societies of uncivilized men, *1795.*  
 who refuse to fetter their conduct, by the authority of government, or submit to any force but physical strength.  
 Such societies, however, if there be any, are rare, cannot long subsist, and are altogether incompetent for the purposes of rational life: for, in all such, reason must be the slave of force. It is true, there may be, even in the social and civil state, individuals without any sense of religion. These instances, however, are not common, and they have been confined to a few individuals: for we have no knowledge of any state, or even of any society, existing without religion; and how far a state or society may exist without religion, is yet matter of speculation. It is also true, that there may be life without reason. Although some of the human species *may* subsist without society; although some societies *may* subsist without government; although some states *may* subsist without religion; there is yet no proof, that a life without society, government, or religion, is natural or proper to man. These things only prove, that out of the religious, social, and civil state, there may be animal life; but, to live as men and as immortals, we must have religion, society, and government. It needs small observation indeed, to satisfy us, that man can neither live comfortably, nor duly cultivate the faculties of his mind, but in society and government. And, so far as the experience of all ages and nations extends, society and government must be accompanied with religion. Moses received his laws from God, and published them under the thunders of Heaven. Mahomet's authority and code were founded on communications with the Almighty. Numa enforced his system to the Romans, by ascribing to it a celestial origin. And the royal family of Peru were all children of the Sun.

Religion, considered as an impression, has been said to be the natural result of solitude and weakness. The mind destitute of visible aid, seeks consolation from invisible power; and the silence and leisure of solitude lead the mind to contemplation and reflection. Religion may therefore exist before society and government; and has sometimes led weak and distempered minds, to shun the civil and social state, to cultivate, in solitude,



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devout meditation. This, however, is an unnatural effect of religion, and lessens, at least, if not destroys its use. No knowledge or principle can be useful, but in proportion as it has influence on active life. Man, made for society, deserts his duty, in abandoning it. And, surely, a principle, of all others the most sublime, was never intended for inactive meditation, or for a state of solitude, unnatural to man. Religion must have been intended, to regulate our conduct in that state most proper for our existence and improvement, and to govern us, in the discharge of the active, social, and civil duties of life. To confine it to retirement, is to pervert it. To apply it to its proper purpose, is to use it as a motive and a guide to useful actions, in a state of society and government.

Whatever consolation religion may afford to the timid and solitary man, it contributes nothing to his skill and power, in the mechanical arts, necessary for comfortable subsistence. To form instruments of labour, to build a house, to procure means of subsistence, he must have companions. No manufacture or art, nothing, for which the mechanical powers or genius of man are designed, can make any progress, in a state of solitude.— In society, the experience and invention of every man and every age is communicated to all; a continued accumulation of experience is made; and a peasant acquires the knowledge of a Bacon and a Newton. Every age of mankind, like every year of an individual, adds new information. Without society, man remains always an infant, has every thing to learn, for himself, and never attains maturity. In society, every generation sets out, from that point of improvement, at which the preceding had stopt, and proceeds to further progress in dexterity and skill. Without society, every man, in all times, without any additional progress, sets out and ends, at the same point, as every other before him had done. A moment's reflection on the labour necessary to raise corn, or to accomplish any other work of art, will shew the necessity of society to man. And the effect of social above solitary labour is far greater, than in proportion to the numbers employed. The attention of each being confined to fewer objects, and sharpened by emulation, his dexterity, in the bounds of his occupation,

becomes more accurate and compleat. The wants and improvement of men thus establishing society; judgment, fancy, experience, and habit, point out what is proper or improper, and opinion, as a law, regulates the conduct. *June Sess. 1795.*

But society would but imperfectly accomplish its object, without government. Can the human passions, with all those seductions, which society offers, be left without any restraint, but decency and virtue? We know they cannot.—We know, that those advantages and possessions, which we acquire in society, cannot be preserved in it, without government. What shall restrain the strong ruffian, from breaking into our scenes of social and domestic enjoyment, or rapaciously seizing the property and possessions, which we have provided as the means of comfort and subsistence? What shall restrain the cunning of the thief, or the malignant artifice of the slanderer? Government. Without government, society is useless or destructive; and men will either have nothing to enjoy, or no enjoyment of what they have. Should, therefore, a number of strangers, by chance meet in a desert island, their first care, after satisfying their immediate wants, would be to form some kind of government; as a pledge, for the good behaviour of each, and a protection of the property of all. With government, society, and religion, man may arrive at that degree of happiness and improvement, which his present and future existence can admit. Without those, he may indeed live; but his life is miserable; and is, at best, but the life of an animal, not of a man and an immortal.

I. Government, or an authority to control the actions of the whole nation, is differently disposed, in different countries. Where despotism prevails, it is the will of one man. In a democracy, it is the will of the whole people, expressed in the laws: after the laws have declared the will of the people, the officers are but mere organs or machines, that speak and act, as they are moved by the general will.

Of the necessity of government, and the difficulty of restraining the passions of men in society without government, some idea may be formed from this circum-

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stance; that philosophers, in forming theories of the history of man, have laid it down as a principle, that a state of nature is a state of war; the objects of possession of each being constant objects of contention among all. No higher eulogy can be bestowed on government, than what is involved in this, that it can rescue society from a state of war, and establish peace, and mutual amity. But it is not from theories, that men derive their estimate of things: and, justly to appreciate the importance of government, as of every other blessing, we must feel or know the want of it. Look to men, in a savage state, before a regular system of government is established among them. Life, and all the means of enjoyment, are, every moment, a prey to the rage of the boisterous, the malice of the vindictive, or the cunning of the insidious. The progress of society, multiplying the means of enjoyment, multiplies the incitements to rapine, and offers no consolation. Plunder, and not honest industry, becomes a trade, and means of livelihood. In Africa, in Arabia, and other parts of Asia, men prepare for a journey, as for a warfare. They must go armed, and in caravans, or large troops or companies. Every stranger is suspected, or treated as an enemy. There being no force in government, to protect them, they must be, every moment, on their guard, to protect themselves: and the weak or unwary traveller, or the defenceless inhabitant, is continually exposed to armed plunderers, and in continual terror, like the inhabitants of an Indian frontier. If we would see, that neither the habits of submission to government, nor the experience of its benefits, can, without an actual, immediate, and constant exertion of its force, restrain the dangerous passions of men, look to nations in a state of revolution, having thrown off one form of government, before they have established another. How terrible are their passions! How fatal their effects. Look to people under a settled government, when, in times of riot or insurrection, they shake off all respect of its authority, and all fear of its power. The obligations of justice, the feelings of mercy, and the ties of affection, are utterly destroyed; every rational, gentle, or benevolent principle is banished; and man displays the rapacity of the wolf, and the fury of the tyger. As of



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cowards, it may be said of men unrestrained by government, and of governments not firmly established, or not duly respected and obeyed; that they are always cruel. A stable government, possessing the affection and obedience of its subjects, is merciful, because it has nothing to fear. A brave man feels in himself a power of protection, and scorns a severe revenge. A timid man sees safety only in the destruction of his enemy. Men under government know, that they have, in its power, a shelter from injury. Remove the authority of government, and you leave no arbiter, to decide between them and their enemies; and, to be safe, they seek to destroy all whose animosity they fear. What has produced the many acts of cruelty, which, with, or without, the forms of law, have lately been perpetrated in France? Is it, that the French nation has less sensibility or justice, than other nations? No: it is because that nation has been in a state of revolution; because the government was not established: because they apprehended, that the old form of government might be restored, and the innovators be called to an account by the former powers: because no party or principle had acquired sufficient strength and permanency, to give its adherents confidence; and they sought their own security, in the death of their opponents. What was it, that, during the late insurrection in these counties, rendered sentiments of cruelty and outrage so familiar to the people here? Have they, in their nature, any peculiar propensity to such sentiments? Far from it: but they had cast off all fear of government, lost all respect for its authority, conceived themselves out of the reach of its power, and saw nothing to fear, but one another. As, without religion, the heart, so, without government, the conduct, of man, "is desperately wicked:" nor is there, in nature, a more malignant and ferocious animal, than man unrestrained by government. I cannot conceive a state more wretched and deplorable, than a society of men, without government. The solitary savage may secure himself from danger, by concealment; but man, in society without government, can neither prevent nor escape it. Examine the history of people over whom government has not compleat control: what is it but a continued detail of

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cruelties and crimes ; of thefts, rapes, rapine, and bloodshed ? In Europe, before civil government had attained system and energy, to compel general submission to its authority, men fortified their houses, as castles for defence against war. But, when government acquired force and respect, to control individual will, those real fortifications were removed ; the laws established an ideal, but more effectual defence round every man, declared the person of every man sacred, and his house an impregnable castle. A consciousness of safety in the force of government, and respect for its authority, softened the manners of men, and humanized their minds. That cruelty and fierceness, which distinguished them in the feudal contests, when the barons, unawed, and unprotected, by any superior power, prosecuted, with deadly rancour, their mutual hostilities ; gradually abated, as the authority and power of government increased. Safety produced comfort and good humour. Men, protected from each other, no longer saw each other as enemies, but as fellow citizens and brothers. Politeness, kindness, benevolence ; and all the train of gentle affections took place of the rude and boisterous passions, which had distorted their minds. The whole nation became as one family, knit together by their common respect for government. " Their swords were beaten into plough-shares ; " manufactures, arts, and sciences were cultivated, and the rational and moral faculties of man were exercised and improved. And then only did man begin to live according to his nature ; when he submitted his conduct to the restraints of government.

2. But government does not extend its restraints over all the actions of men. There are many things, which a subject of government may either do, or forbear.— And yet the doing, or forbearing of them may affect the happiness of the society. It may seem strange, that government, whose end is to promote the happiness of society, should not be so extended, as to embrace all its objects. Perhaps, however, it is more consistent with the general system of nature, to leave man, in many things, free from fear of immediate punishment, and permit motives of benevolence, generosity, decency, and propriety, to produce voluntary, and, therefore, more meritorious effects in the conduct. Man is a free,

rational, and moral agent ; and it is more honourable, to leave those distinguishing powers to proper exercise, than to train man, by constant discipline and punishment, as the horse or the ox, by the lash or the goad. Government, therefore, confines its regulations to such things as are essential, or most necessary for the society, and, with respect to them, enforces the obligations which it imposes. There are rights, which are called perfect ; and rights, which are called imperfect. Perfect rights are positively enjoined, and enforced by a penalty. Imperfect rights have no penalty annexed to their violation. A man will be compelled to pay a debt : but government does not compel to do an act of generosity or charity ; to lead a life of exemplary industry or virtue ; to cultivate the faculties of the mind, improve it in science, and enlighten the world with knowledge ; or to acquire manners and habits of politeness and strict decency. Yet all these are useful to society, and promote its happiness ; and are therefore duties incumbent on a rational and moral being. But although government, or the laws of the state, enforce not those duties or obligations ; they are not, therefore, without law to enforce them, or motives to induce them. Opinion, or the law of society, has a strong influence on the human mind. The love of esteem, respect, or reputation, is a powerful principle in our nature, and leads strongly to submission to opinion, of the law of society. The effects of a proper exertion of opinion, the law of society, might be great and beneficial ; and it is unfortunate, that they are not attentively considered, and steadily prosecuted. The great point is to get opinion on the side of virtue ; to enforce, by its influence, useful studies, arts, principles, practices, and manners ; and to reprobate every principle or habit of a contrary tendency. This point is what the moral satyrist, poet, essayist, orator, and preacher aims at. Without this, the best government will, in a great measure, fail of a compleat attainment of its end. If men do no more good, than what they may be compelled by the laws of the state to do, they will as imperfectly promote the public prosperity, as a man promotes the prosperity of his family, when he labours no more, than is sufficient to earn a bare subsistence, and keep them from starving. This necessity compels : and by necessity, or by fear, any animal may be compelled, to

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perform, punctually, a prescribed task. For man, to do only this, is not elevating himself above the lower order of animals. To be a rational and moral being, he must do what is good and laudable, of his free will, from reflection and judgment, and a persuasion, that it is proper and useful, and from a sense of duty, independent of any positive law, or fixed penalty. And, to lead to this, there must, besides government, be also society, having opinion, as its law, with honour and shame, as its sanctions; and these, acting on a correspondent sense in the human mind, will produce the proper effects in the conduct, and supply the deficiency of coercive power in government. Thus, the influence of society, uniting with the force of government, the actions and manners of men are regulated. Government binds men together, by compulsion and fear.—Society binds men together, by sensibility, good will, mutual respect and interest, and by every generous principle of a rational and free agent. But the force of government, and the influence of society, united, can reach no farther than the actions and manners. To regulate the heart, there must also be religion.

3. It is inconsistent with that perfect arrangement of means and ends, in every thing that we can discern in nature, to believe that virtue, or a conduct most suitable to the nature of man, is not, on the whole, most conducive to happiness. To every course of life some inconveniencies are annexed; but an intelligent man will discern, a prudent man will pursue, and a good man will love, that course, which, on the whole, is the best; and that course, if nature be directed by wisdom, power, and goodness, must be virtue. Both by interest and duty, therefore, man must be directed to virtue; to seek the happiness of himself and his fellow men, to second the efforts of nature, in the production of good, to work together with God, as instruments in his hands, for his benevolent purposes, as parts of the creation, to fill up the chasm, between animal and celestial life, as stewards or servants, intrusted with the management of certain gifts and powers, for the exercise of which we are accountable, as free agents, and subjects of his moral government. But man is partly of a rational, partly of an animal nature; and each part draws him to different

objects. "The flesh lusteth against the spirit, and these are contrary, the one to the other." The authority of government, the influence of society, true interest, and a regard to duty, cannot, at all times, keep even the wisest and best men steady to that course of life, which all those motives point out. Something farther is yet necessary, to give the rational part of man a constant and decisive superiority; a wider range must be given to his hopes and fears, an unlimited scope to his imagination; scenes, beyond all that he can discern, must be disclosed, and another life opened to his view, compared with which, this life is but as a moment. All this is done by religion: aided by its motives, the spirit of man triumphs over his animal nature, opposes the force, and dispels the enchantment of passion; and rescued from its dominion, the mind of man, like a rational and moral being, is led by a sense of duty. To secure happiness and virtue, man must, besides government and society, have, also, religion.

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By religion, I do not mean that, which exhausts itself in prayers, fastings, or retirement. I say *exhausts* itself; because I will not disparage those means of virtue; but only warn against considering them as ends, or as religion itself. By religion, I mean, such a sense of God upon the mind, and such a belief of a future state, as produces a life of useful actions.

The foundation of all religion is the belief of a God. Unless an effect may be without a cause, unless the most intricate mechanism, with the most perfect adaptation of means and ends, infinitely exceeding our utmost conception, do not necessarily imply design, understanding, and power in its author; unless intelligence can be communicated to man, from a source without intelligence; there must be an author of nature infinitely wise and powerful. This, perhaps, would not be denied, if the vanity of man's heart did not lead him to seek also to know, what this author of nature is. And, because his limited mind cannot comprehend any thing capable of producing such effects, he disdains to believe, what he cannot explain. Infidelity, like credulity, is the offspring of ignorance and limited faculties. Had the natives of Jamaica, who, when they found, that Columbus had predicted an eclipse of the sun, believed him a

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God; been told by him, that, in Europe, water became hard, like a stone; they would have believed him a liar. The ignorance and weakness of man, setting up, for God, the vain phantoms of his own imagination, can extend to nothing corresponding to the boundless wisdom and power manifested in the works of nature.— Therefore, rejecting his own idol as absurd, and finding himself incapable of substituting any thing better in its place, the pride of his heart leads him to infidelity. Yet even this rescues him not from his difficulty; and man, exercising his reason on the author of nature, is doomed to remain in a dilemma: for it is as impossible to comprehend, how the universe could have been made, and continued in existence, without intelligence and power in its author, as to comprehend who, or what, its author is: and whether man believe, or disbelieve, in a God, his mind must be bewildered, when it plunges into the contemplation of the origin of things. Philosophers may “darken counsel, by words without knowledge; but they cannot, by searching, find out God.” Some of the simplest operations of nature, it is altogether above our reach, to understand; yet our senses compel us to admit their existence. Is it then strange, that we cannot comprehend the author of nature; or absurd to believe, without comprehending? It is enough for us, that there is, in nature, a great productive power, arranging all things with infinite wisdom, and, by instinct, reason, and the constitution of things, pointing out, to man and other animals a certain course of action, adapted to the nature of each; and that from this power, man, from his being affected by good or evil, is continually subject. This power, unless we can believe, that a power can communicate intelligence, without possessing it, we must believe to be intelligent. We must believe, also, that this power exercises a moral government over the world; unless we can believe, that a sense of moral duty was given to man, without requiring that he should exercise it. This incomprehensible power, without seeking to understand what we name, we call God. When even the smallest things require care, direction, and government; shall the universe need no guide? If a house cannot be made without hands, had the world no Architect? If a single family



must have a head, rules for its government, and foresight and means, for its provision; shall the great family of nature be without protection? If dissolution of government in the smallest state, produce disorder and crimes; shall we leave the whole creation to chance and accident, without wisdom and governing power? Such a supposition accords not with that analogy of nature, which we perceive to exist in all things that can be subjected to our observation. From all that we know, we are led to believe, though it is above our reach of comprehension, that there is an Almighty power, which made and governs the world; and from that belief of this creating and governing power, religion, or a respect and submission to this author of nature, follows, as a thing of course.

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The belief of the immortality of the soul, as of the being of a God, becomes difficult, from the ignorance and pride of man. We will not believe, but where we understand: and the nature of spirit is altogether above our comprehension. So also is the nature of matter: we can judge of it only from its properties. Mind has properties also: it is something that can think, feel, will, hope, fear, remember, &c. But as it cannot, like matter, be a subject of our external senses, we need not wonder, that it should be denied, when even the existence of matter has been denied. Both can be known, only from their properties; and consciousness, the only evidence of the existence of matter, equally proves the existence of mind: and, it would seem, proves it more strongly; for some, whose philosophy led them to deny the existence of matter, considered the existence of mind as the only thing certain. Mind, incomprehensible, in its nature, has been compared to the eye, which discerns every thing but itself. Admitting or rejecting the existence of mind, or soul, the faculties of man are equally above our comprehension. It is not more difficult to comprehend, how soul may exist without body, than how soul can act upon body, or body act without soul. Some one of these cases must exist; but whichever of them we choose, as the object of our belief, we must believe what we cannot comprehend. If soul can exist *without* body, it may exist *after* it: corruptibility is a property of matter;

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we know not, that it is a property of mind. Mind is the man; and independent of any one member or faculty, there is something, which every man calls himself: nor have we any satisfactory reason, from any thing that we can know, to conclude, that death, or the cessation of animal powers, extinguishes the powers of the mind. It would be, at least, as difficult, to prove, that it does, as that it does not: and he who denies the immortality of the soul, has, at least, as little ground for his opinion, as he who believes it. Experience informs us, that sleep may suspend, without destroying, the powers of the mind. May not death be only a change of the manner of exerting the faculties of mind. Such changes we discover in some animals. Such a change man himself undergoes, at his birth. In this life, the mind cannot exert all its faculties, without the present organs; and the destruction of some of the organs destroys the corresponding perceptions. Yet the mind remains, and can have other perceptions, by means of its remaining organs. After death, may not the mind act by other organs? And, when it has lost some of its present organs, can it not, by its faculty of reflection, memory, and conception, call up, as it were, the images of its past perceptions, or, by fancy or imagination, frame a world of its own? Cannot a man who has lost his sight, solace himself, by the recollection of a beautiful landscape, which he has once seen? Are there not many faculties, which the mind exerts, without any organ known to us? By what organ does it exert the faculty of memory, of reasoning, of fancy, of conception, of will, &c.? Point out the organ of the body, whose destruction, without death, would destroy those faculties of the mind.

The belief of the immortality of the soul is founded on reasoning and revelation, and has existed long in the world. Its rational foundation rests on the spiritual nature of man. Plato concludes, that man must be immortal, because a sense or expectation of immortality is impressed on his mind by the author of his nature, whence deceit, or any false impression could not proceed. On whatever foundation this belief rests, it is highly favourable to virtue and happiness; and it will appear, that Religion, as well as society and government is necessary to man.

It is so, on various grounds.

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1. It adds new and powerful motives to those principles in man, which are most strongly opposed; the benevolent, rational, and moral principles. It adds vast energy to the sense of duty. It places the strongest barriers against the passions, by a sense of the presence of the author of our nature, and by the hopes and fears of a future and eternal existence. And it furnishes a sweet cordial against the evils of life. Hope, that inexhaustible source of happiness, here finds ground for her anchor, when every thing else eludes her grasp.

2. Government and society may restrain the actions and the manners, but cannot reach the heart, nor even the secret conduct, of man. Religion restrains, purifies, and improves the thoughts. Government and society compel the concealment of faults. Religion promotes the cultivation of virtues. A man, without exposing himself to the laws of government or society, may still be a hypocrite. To escape the laws of religion, he must be sincere. A distinguished nobleman, in a series of letters to a son, seems to labour chiefly, to form his manners, and enforce, as an ultimate end, rather the necessity of being agreeable, than that of being good. But, when the heart is corrected, and the thoughts chastened, there is a greater security for virtue, than where only the conduct and manners are restrained.

3. Some standard, presumed above the power of man to alter, is necessary, to preserve the principles and rules of government and society, of political and moral duty, from corruption and perversion; from being bent, according to the interest of those who have the power of doing it. This standard is religion; which dictating the belief of a supreme, intelligent, and moral governor of the world, reduces, before him, all powers and men to a level; all accountable to the author of nature, for their conduct towards each other; deduces a system of fixed rules, unalterable by any human authority, and sanctioned by the hope of divine favour, and the fear of divine vengeance. This is a law of a higher nature, than any other. From the relation of fellow citizens, to each other, is derived municipal law. From the relation of nations, to each other, is derived the law of nations. And from the relation of creatures to their



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God, and to each other, arises this universal law of religion, which "confounds the wisdom of the wise, the power of the strong, the pride of the haughty, and the number of the many; introduces a new tribunal, before which all nations, powers and men, are equally accountable; prescribes a system of laws, which all are equally bound to obey; and denounces punishments, which none can escape. All civil and political authorities dissolve before this. The law of nations may make the world one great republic; but it is a republic of nations or governments; every collection of men, called a nation or government, is an individual to every other; and no government or people has authority, to call any other government or people to an account, for any internal conduct. The most degrading tyranny, or the most licentious anarchy, or the utmost profligacy of manners and principles, may prevail; domestic slavery, or general idleness, may extend over a whole people, and the law of nations gives no other people any power, to correct or restrain them. But this universal law of religion "breaks down the partition walls," which divide each people from every other; considers all nations, and the authorities and individuals in each, as one great family or republic of individuals, all equally subject to the government of the author of nature, and equally and mutually bound to the relative duties of each. Societies may agree to a general corruption of morals, and that, in this degeneracy, each individual shall keep all others in countenance. Nations may agree to pervert the principles of their government. What shall restrain them? Religion: the laws of which are an universal constitution, inviolable by any individual, society, or government; by the principles of which the conduct of each may be compared; and with which, according as the conduct of each corresponds or disagrees, it is lawful or unlawful. Does not this introduce new obligations and motives to virtue, and additional security for happiness?

There may be men out of the reach of the laws of government and society. True, this cannot be; but where power and wealth are very unequally distributed. In a democratic government, no man is out of the reach of the laws. And, in a state of society, where wealth is not distributed very disproportionately, few men can

be out of the influence of public opinion. This form of government, and this state of society, are, therefore, the most favourable to virtue. When men, from the state of their circumstances, or the temper of their minds, despise the opinion of the world, even when on the side of virtue; society has no restraint on them. Slavery, infamy, excessive wealth, or a selfish misanthropical disposition, tend to this; and tend, therefore, to the prejudice of virtue and happiness. To regulate the hearts, the manners, and where they are not regulated by government, the actions of such, they must have religion. Religion is also necessary, to restrain those over whom government has no restraint. What can restrain the injustice of a despot? Religion. In the most despotic countries of Asia, where there is no political authority to restrain the prince, he dare not transgress the rules of religion applied to cases of a civil nature. "Admitting, therefore," says a profound writer, \* "that it were useless, for subjects to have religion, it is necessary, that princes have it; as the only curb, which those, who fear not human laws, can have. A prince, who loves religion, and fears it, is a lion, that yields to the hand which strokes him, or the voice which soothes him: a prince, who fears religion, and hates it, is like a wild beast, that bites the chain which restrains him from darting on those who pass by: a prince, who has no religion, is like a terrible animal, that never feels his liberty, but when he tears in pieces and devours." Religion therefore is the only barrier against the power of a despot, or of all those who, in any state of society, or under any form of government, cannot be controlled by the laws of the society or the state. Something like this subsisted in the antient mythology. Even Jupiter, the king of the gods, had his omnipotence restrained by the decrees prescribed in the book of fate. So strongly is the sense of a general superintending law impressed on the human mind, that fable must adopt it, as part of its machinery.

The preceding observations on the importance of government, society, and religion, may suggest some useful instruction. For every good man, who believes

\* *L'Esprit de loix*, xxiv. 2.

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them, as they have been stated, to be essential to human virtue and happiness, must feel himself strongly bound to respect and support them.

I. The man, who seriously reflects on the necessity and value of government, as what alone can secure to us the benefits of society, the improvement of our rational nature, and the enjoyment of safety and peace; will learn how important it is, to cherish a respect, and observe and enforce a constant submission to its authority. The obligation of this duty is increased, in proportion to the extent of the basis, on which government is founded. I have already observed, that, by government, is meant the laws: for officers are but machines, which must move as the laws direct. In a government like ours, where the laws are the will of the whole people; the obligation of respect and submission to them, is the strongest that can be conceived. What government will we obey, if we obey not that, which is founded on our own will? Where the people have no power in making the laws, there may be a necessity, that public contempt and censure should oppose injustice and oppression in the laws. But where there is a constitution, setting bounds to the authority of the legislature; a judiciary, which can annul an unconstitutional law, frequent and general elections, when the people, by changing their representatives, can change the laws which they dislike; the evils of any law must be but short lived; the remedy is always near at hand; and, supposing a temporary inconvenience, it is not sufficient inducement, to risk the peace of the state, by fostering a disrespect, which ignorant, rash, and violent men may pervert to an opposition, to the laws, which may weaken the force, and destroy the benefit of government, and introduce confusion and anarchy. This perhaps was not sufficiently discerned and considered, till an unfortunate experience taught us its importance. It is peculiarly incumbent, therefore, on citizens of a democratic republic, to hold the laws in veneration, and whether acceptable or disagreeable, treat them with a sacred respect and obedience. No law ought to be suffered to lie inactive and dormant: all ought to be carried into execution. If laws be improper, let the will of the people, legislatively expressed, expunge them



from the code, or correct their inconvenience: but while they have the sanction of legislative authority, they ought to be exerted. If any law be treated with disrespect, or rendered inactive, by the opinion of some individual, neighbourhood or society; the authority of government is debased; the way is opened for general disrespect and neglect of all laws; private will, and not general will, governs; and the laws of society controul and defeat the laws of the state. This is dangerous, and tends to the destruction of government: However unfashionable or unpopular a law may be, while it exists, it ought to be constantly respected, exerted, and obeyed: if it be not, the existence of all laws, and all government, becomes precarious.

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I will give an instance, where fashion, or public opinion, the law of society, seems to have rendered a law of the state, in great measure, inactive. There has long subsisted in Pennsylvania, a law "for the prevention of vice and immorality." I am not now called upon, to defend the principles of that law, or to enquire, whether the legislature have, or have not, in it (as is sometimes done) *legislated too much*; or whether it would, or would not, be more prudent to leave many points of this kind to the voluntary exertion of a sense of decency and duty, and to the laws of society and religion. The only light in which I am to view it now, is as a law; and, as such, whether it be a good, or a bad law, it ought to be respected, exerted, and obeyed: for the example of the neglect of it plainly tends to the neglect of every law; and neglect naturally producing disobedience, tends, therefore, to the destruction of the government, which rests on respect and obedience to the laws.

2. When we consider the prodigious influence, which fashion, public opinion, or the law of society, has over the conduct of men, we must be struck with the important use, which might be made of this influence, in favour of virtue and happiness. The man, who, selfishly and morosely, discovers and inculcates a contempt of public opinion, removes one of the strongest supports and motives of virtue and usefulness. And the moralist, who can persuade mankind to set fashion and public opinion on the side of virtue; to bestow respect only on

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good and useful actions, and contempt always on foolish and wicked actions; and to enforce, by the laws of society, respect to the laws of government and religion, will do the most important service to human virtue and happiness, that they have ever received, since the promulgation of the gospel. Let us pursue this principle, and give countenance and respect only to virtue, to useful actions, to obedience to the laws of God and of the state. Let us not disregard, but respect, public opinion; and guide its application, as a motive and a reward of an useful life, and a check and punishment of folly, wickedness, and disregard of civil duty.

3. The man who reflects on the salutary maxims of religion, the weight of its sanctions, and its mighty force, in improving the hearts and lives of men; will acknowledge, if the arguments, for and against it, were but equal, that it would be an office becoming wisdom and philosophy, instead of weakening the obligations of religion, to direct its authority, to aid the opinions of society, and the laws of the state, in producing obedience and a regard to duty, in making good men, and good citizens. Cherish religion; cherish all the means of impressing on the minds of men, a sense of God, and of a future state. No principle whatever will operate more powerfully in producing usefulness and virtue, in making good members of society, and good subjects of the laws. It arms the sense of duty with the most important influence, and dictates a regard to all the duties of private, social, and civil life, "not only for wrath, but for conscience sake." Such is the tendency of all its principles, maxims, and rules. This wisdom from above is pure, peaceable, gentle, and full of good fruits.\* "Whatsoever ye would, that men should do to you, do ye even so to them; for this is the law and the prophets.† Let every soul be subject to the higher powers: for there is no power, but of God. The powers, that be, are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God, and they that resist shall receive to themselves damnation."‡

\* *James iii. 15—17.*

† *Matth. vii. 12.*

‡ *Rom. xiii. 1—2.*

4. We may reflect generally on the great consequence to virtue and happiness, that the laws of government, of society, and of religion, be not separated; but that they unite and concur in their operations on the sentiments, manners, and conduct of men. The joint efforts of religion, society, and government, might produce important improvements on the human heart and life. But if their efforts be separated, or set in opposition to each other, they weaken or destroy one another, leave no sense of duty on the mind, and prepare men for every irregularity. What horrible crimes have been perpetrated, under an opinion of doing God good service! And how much stronger would be the obligation and inducement, to perform all the duties of men and citizens, to obey the laws of society and the state; if men constantly bore in mind, that "such is the will of God"! Those three laws, of God, of the society, and of the state, have a mutual dependance on each other. Lessening the obligations of one lessens the obligations of both the others also. That man cannot be truly religious, who disregards either the laws of the state, or the rational opinion of society. That man cannot be a good member of society, who disregards either the laws of the state, or of God. And that man cannot be a good citizen, who disregards either the laws of God, or of the society. The breach of any one of these laws is a violation of duty; and to deserve a good character, we must respect all.

I think it a tribute of praise due to the two presbyteries in these counties, to add here, that the application of these principles has been made, with great propriety, in their late resolutions, to refuse (without satisfactory evidence of repentance) the distinguishing privileges in their church, to all persons, who, during the late disturbances, had an active hand, in burning property, robbing the mail, and destroying the official papers of the officers of government; in their declarations of hearty disapprobation of all riotous, illegal, and unconstitutional combinations against the government, the laws, or the officers of government; and in their earnest recommendation and injunction, to all people under their care to be subject to all magistrates, and lawful authori-

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 1795. promote the peace of society, and submission to the laws of the state, is a co-operation of ecclesiastical with civil authority, and a specimen of the useful practical purposes of religious principles, that must receive the approbation of every man of virtue and sense, and, I hope, will be exhibited by the other churches. For they must all see, that the motives to submission to lawful authority, must be greatly strengthened, if, without that, men find, that they will be cut off from every church. And to strengthen the motives to submission to lawful authority, all churches must perceive to be their duty; since it is a dictate of religion, that "every soul, for conscience sake, and to avoid damnation, be subject to the powers that be, as to the ordinance of God."

\* See *Pittsburgh Gazette* of 9th May, 1795.

## No. XV.

*Virtue the principle of a Democratic Republic. The necessity of virtue in the people, especially in Elections.*

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Virtue can have effect only in proportion to its power. In any other, than a republican form of go-

\* This (except a few paragraphs) was written next after No. XI, and intended for September Sessions, 1794, but not then delivered; the insurrection requiring attention to the transactions of that period.

vernment, virtue in the people can have but little or no effect: for their power is little or none. In other governments, virtue must be confined to domestic, or nearly relative duties, social or friendly acts of benevolence. In other forms of government it is public power, which alone can effect public good. In a democratic republic, to produce public good, there must be public virtue in the whole people: for in the hands of the whole people is the authority and force of the nation really vested.

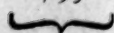
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Without virtue in the people, the benefit arising from a democratic government altogether vanishes. If, breaking through the strong motives to virtue, which accompany this form of government, the people lose sight of public good, and suffer themselves to be corrupted by selfish passions, and base views; all the wretchedness of tyranny is united with the reflection, that they are, themselves, the authors of their own misery. And, since the government becomes equally mischievous, as any of the worst form, its beneficial nature can neither remove the shame, nor alleviate the guilt, that they have become the tyrants of themselves, and the slaves of their own vices. If virtue is extinguished, if the public force is not directed to the public good, if every individual, regardless of the common interest, pursues a selfish and separate end; and the exertions of all, instead of co-operating for general prosperity, contend for private and discordant gain, individual exertions mutually defeat each other; the activity of all is inefficacious or corrupt; the liberty of the government exists only in theory and form; for, in reality and effect, all the baneful fruits of oppression are produced; and, whatever subsequent changes this best form of government may undergo, the actual condition of the people will hardly be injured, and may possibly be improved. For the power of government might better be in the hands of one, who might, at least be partial towards all, and restrain the mischief of every one but himself.

Indeed, when the people have lost their virtue, a democratic form of government, will not long subsist. When they have formed other views, and begun to

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pursue other ends, than the public good ; the vast variety, and incongruous nature of the interests prosecuted, will open their eyes to the danger of each. Those, whose interests are most nearly the same, will unite in separate factions, for their own defence. *Divide and govern*, the maxim of every tyrant, will be the principle of every faction towards every other. Some one faction, by numbers, accident, or cunning, will become predominant over the rest ; the nature of the government will, in fact be changed into aristocratic oppression ; and an aristocratic form of government will soon acquire the public sanction. Similar dissensions, among the individuals of the aristocracy, will, in time, cast a predominancy into the hands of some one of them : and a tyranny of one will be established.

In other governments, though the people cease to be virtuous, the government may be preserved : because there is a controuling power, independent of the people, which can preserve the authority of the laws, and make them be obeyed, though they should be hated. But, in a democracy, when virtue is lost, the government is lost. To preserve the spirit of the government, in its administration, its officers must see, that the people maintain a constant care and love of it. The administration of the government is the execution of the laws. The object of the laws is public good. When the people lose their love of public good, they lose their love of the laws, which are the means of promoting it, and the force of the laws is broken ; for the force of the laws is in the people's love of them. If the people hate the laws, or view them with indifference ; or if the laws oppose the inclinations of the people, public officers, dependent on the people, will not execute them : and the laws will become a dead letter. Without virtue, the people will not bend to the laws : the laws will bend to the people. The natural support of the laws, virtue in the people, thus failing, the laws fall. The laws are the government. When the laws fall, the government falls : and, since it has lost its use, become incapable of enforcing the prosecution of public good, it ought to fall. Some military or intriguing usurper, or political faction, fostered and conducted by the corruptions, oppressing the weakness, or flattering



the vices, of the people, will seize the vacant throne of the laws ; and, with the destruction of the government, restore a force, that will subdue the passions of men, restrain individual violence, and bend the will of all to the governing power. The people, no longer fit to be citizens, become subjects, perhaps slaves. *Sept. Sess.*  
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Such is the natural progress of a democracy, where the people have lost their virtue, abandoned the desire and pursuit of public good.

If, in a republic, the want of virtue in the people destroys the beneficial nature of the government, and soon changes its form ; it is not without reason, that virtue is considered as the principle of a republican government. Indeed, from the slightest attention to the nature of a democratic government, it will result, rather as a self-evident truth, than as an assertion requiring any illustration, that, without virtue, in the people, a democracy can produce no happy effects. Whatever be the form of the government, if the ruling power be destitute of a desire, to promote the general good, the government must be bad ; for its force will not be directed to any useful end. In a democracy the people is the ruling power ; and if the people be destitute of a desire to promote the public good, or, in other words, be destitute of virtue, even this government, which, of all governments, is the most favourable to happiness, must be bad. If virtue can be made the principle of the ruling power, it is of little practical importance, where this power resides. Even despotism, of all governments, the least favourable to general good, has been considered as capable, in the hands of a virtuous prince, of producing the most happiness ; for here virtue has no restraint on its exertions. But as there is no certainty of guarding, even a virtuous prince, from corruption, and yet less, of securing a succession of virtuous princes ; a nation, careful of its own happiness, will not, unless experience declare its necessity, choose this form of government. Prudence, viewing the fallible constitution of man, requires that duty be constantly combined with interest ; that power be given to those, who have the least inducement to abuse it ; and that authority, over the condition of all, be exercised by all. From these principles, results the propriety of preferring, to all others, a democratic republic.

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But if, in a democratic republic, the people have lost their virtue, the ruling power has become destitute of a desire to promote the public good ; this ground of preference to any other form of government (and the only ground of preference, which it possesses) ceases to exist ; and this government becomes as destructive to happiness, as any other. Each individual, instead of contributing to increase the sum of public prosperity, strives to filch, from the general mass, as much as he can, and convert it to his private enjoyment. The natural object of the society, mutual protection, is perverted into a system of mutual plunder. The nation, instead of a band of patriots, united for common aid, becomes a gang of pilferers and robbers, without union or confidence, plundering their fellows, and the world. All principle and right is sacrificed to selfish passion. The whole people become depraved, without any controlling power, to restrain them, the misery, produced by this form of government, equals, in magnitude, that, which the worst tyranny can produce ; and is the more hopeless, as there remains no prospect, that it can be removed or mitigated : for, one generation transmitting its manners to another, the people never die, and hardly ever reform, but by some terrible calamity, or violent dissolution of the whole frame.

The object of a democratic government being the equal defence of all, to secure to every man the natural and just effects of his own faculties ; superior advantages can only be conferred on superior virtues ; on those whose talents, disposition, and conduct, eminently promote utility. When the people are virtuous, their virtue will necessarily produce this effect ; for this effect is necessary for public good. Then every man is safe in the possession of his just share of property and influence ; and the happiness of all is best secured. But if virtue is banished from the people, if they cease to know, love, and pursue the public good, every man strives, by all possible means, to secure to himself the utmost portion of public advantage. Equality and justice, a distribution of advantages according to useful faculties, is no longer regarded. No man asks, what is useful to all, but only what is useful to himself. The whole manifests, not a disinterested exertion of useful powers, but

a base scramble for offices and gain. Superior advantages are no longer the reward of the honest and the useful; but the prey of the cunning and the rapacious. Talents and integrity disappear from public stations; and they are filled by deceit and rapine. Authority is exercised by the ignorant, the base, and the unprincipled; and the powers of government are no longer directed to the public good, but to a wild variety of private ends, and plans of mischief.

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The difference is perhaps less felt, between a good and a bad *form* of government, than between a good and a bad *administration* of the same form. A poet of high reputation considers forms of government, and modes of faith, as matters of indifference, and a good administration, and a good life, as the real objects of importance. Bestow but a little reflection on the state of a democracy exercised by a virtuous people, and the state of a democracy exercised by a people without virtue; and the effects of each appear vastly different. In the first, every man enjoys safely all that he can acquire, by useful means; in the last, every man enjoys all that he can acquire by the most baneful speculation. In the one, a man rises to respect, by an honest and diligent use of profitable talents; in the other, he acquires influence, by dissimulation, baseness, and iniquity. In the one, to serve yourself, you must serve the public; in the other, you may best serve yourself by cheating the whole. In the one, the hands of all are combined, to support virtue, and to suppress vice; in the other, the virtuous man can find no friends or associates, and the knave is always sure of partners and patrons of his schemes. In the one, there is no danger, but every encouragement, to integrity and usefulness; in the other, fraud and corruption have nothing to fear, and public spirit nothing to hope. Wisdom directs the whole power of the one nation, to general good; cunning directs every mind in the other, to private gain, at the risk of public calamity. The one nation resembles a company of merchants, united for mutual benefit, each receiving advantage, in proportion to his stock and labours; the other is a captured city, given up to indiscriminate pillage.

Attached, as we justly are, to a democratic govern-



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ment, we are disposed to view with surprise, a nation having this form in its option, and choosing another. But if an ill administration of this favourite form be not less pernicious to public prosperity and happiness, than the worst form of government; may we not, with equal surprise, view our own conduct, if, in the administration of our democracy, we are not actuated by virtue. If, in fact, our government produce not its proper effect, general good; it can neither diminish our disgrace, nor add to our consolation, that the fault is not in the form, but in the administration of our government; and that, without hazarding an experiment, in a change of our form of government, we can remove the mischief, by changing only our own conduct and manners.

If possessing as we do, the best form of government, we see it, in any respect, fail in the accomplishment of its genuine object, public prosperity; the fault is in the people; for with them is the power. Let the man who complains of any measure of administration, consult his own breast, whether he is not chargeable with some of the blame. Has he, in appointing to office, or in any public duty, contributed nothing to the general corruption? Has he been influenced only by virtue? Or has he been governed by partiality or selfishness? And what effect was his conduct calculated to have on the conduct of others? In governments, over which the people have no influence, it is useless for individuals, to examine the progress of political transactions, or the conduct of themselves and others in public duties. But for the citizens of a democracy, in whose hands, either directly or indirectly, all power resides, to be indifferent to public transactions, is a neglect of duty, and a disregard of liberty. Nor is it less censurable, to suffer their examination of public measures, to expire, in the gratification of curiosity, and the acquisition of knowledge. Can the citizen be less guilty, who neglects to reform the errors, which he sees; than he, who neglects to see the errors, which exist? Our knowledge of public conduct ought, therefore, to regulate our conduct, as citizens; it ought to lead us, to reward, with esteem and appointment, those men, whose conduct has deserved our confidence, and to punish, with neglect, and

removal from office, those men, who have deceived our hopes.

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As the citizens, by the delegation of their powers to officers, wave not their right to examine and animadvert on the manner, in which this power is exercised, so the officer, in accepting this delegation, waves not his right of a citizen, to examine and animadvert on the conduct of other officers and citizens. Though a citizen, in becoming an officer, remains still a citizen, his new capacity subjects him to an additional scrutiny. No citizen ought to accept an office, if he want either virtue or competent talents. If a citizen is conscious to himself, that his faculties are inadequate to the duties of the office ; or that he wants industry, to apply his faculties to the full exercise of the authority vested in him ; or that he wants spirit or inclination, to exert the authority of the office, to its true constitutional extent and effects, and render it productive of as much public good, as its lawful extent will admit ; or that he seeks the office, for his own interest only, without an honest and reasonable view of being useful in it ; by accepting an office, he commits a crime against his country, corrupts the administration of the government, and merits the disapprobation and resentment of his fellow citizens.

Speaking with a view to government, virtue in the people, since they cannot exercise the powers of government themselves, is chiefly useful, in producing virtue in their officers. But, whatever be the excellence of virtue in the people, it ceases to be useful, even in a democracy, since the authority must be exercised by officers, if these officers are not virtuous, that is are not, in their stations, desirous, capable, and diligent, to promote public good.

I know nothing more detrimental to the virtue of officers, than a disposition in the people to be pleased with flattery. The powers of an office are general rules, the application of which must therefore occasionally give offence. The situation, humour, and passions of men, being various and changing, the exercise of a public office, will, of those on whom it operates, be disagreeable, *always* to some, and *often*, to many. Officers are therefore seduced, by a love of what is called popu-

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larity, to give that kind of flattery to the people, which of all others, is the most acceptable, in accommodating their conduct to the humour of the day, or the solicitation of the applicant. Thus the true end of the office, *serving* the public is perverted into a false end, *pleasing* the public; the duty of the office is betrayed; the constitutional end of the office is defeated; the general rules of office are broken down; and the law might as well have left the officer, without any instruction or limitation of power, confident, that he would always choose, to do what was pleasing, in order to secure his continuance in authority.

Let the people change their temper, and officers must change theirs. Let them tell officers, "we desire you to do what is *right*; and we shall despise you, if your study is to do what is *pleasing*. We are not to be flattered with little arts, studied assiduity, and temporary compliances. The popularity thus acquired is short and contemptible. Choose a right line of conduct: this will, in the end be approved."

Let then the people despise flattery, and flattering arts. In a democracy, if the people be virtuous, they will always find their officers virtuous, or make them so: and if the people be corrupt, their officers will be corrupt also. The stream will be like its source. The sap, that rises from the root, will work its way to the topmost leaf. If there be virtue in the people, it will run through all the branches of government. If the people be corrupt, corruption will defile every channel of administration. If you would, therefore, make your government excellent in practice, as it is in theory, preserve and enforce the love and pursuit of public good.

Above all, let the people reflect on the importance of that authority, which they exercise; and let them act with the dignity and independence, which its importance requires. At other times, they exercise the sovereignty by agents; but there is one day in the year, the day of general election, when they assume the sovereignty in person. Then, especially, they ought to scorn every mean motive and unworthy art; and, with a spirit becoming the rank they occupy, divesting themselves of every private and selfish end, and listening only to the



voice of patriotism and virtue, like so many Alexanders, give their votes to the most worthy.

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To the curse and calamity of this country, there has long prevailed among us a set of people, known by the name of *electioneering men*, whose conduct, the whole year round, is constantly governed, by the prospect of influence on the day of the election. This might be fair, and might be laudable, if their motives, for the pursuit of popularity, were honest; if their addresses were made to the understanding and interests of the people; and if they used their influence, to direct the people to virtue, and to promote the public good. But when we see, that their motives are selfish, their ends private gain, or personal revenge; or their means popular delusion, by ignorant or dishonest and destructive practising on the passions and prejudices of their fellow citizens; in what light can we view them, but as fiends, who seduce, that they may destroy, or raise a storm, that they may ride in it; or as robbers, who set fire to a house, that they may plunder it: or, "as a mad-man, who casteth firebrands, arrows, and death, and saith, am I not in sport?"\*

For some years, this has been pursued a system.—Whenever one of these men wishes to bring into office himself or his friend, or turn out his enemy, or to push himself forward to public notice, and become of consequence, or to accomplish any other selfish or unworthy purpose, he stirs up a complaint of some public grievance, or lays hold of some popular subject of discontent. To extend his influence, and attain his purpose, he gathers to himself others of like sentiments and views, or dupes to his art, or tools to his designs. And, to add to their opinions and projects the influence of numbers, and the shew of unanimity, meetings, committees, or societies, are held and established.

I mean not to question the privilege of any individual, freely and fairly to discuss any political measure. I mean not to join in the indiscriminate censure of all combinations and societies. Mutual information and mutual assistance are social duties. I mean not, for it would be presumptuous, to dispute the right of citizens,

\* Prov. xviii. 26.

*Sept. Sess.* 1795. to meet and associate together, for the consideration of any public question. It is the abuse, and not the exercise, of this right, that I censure. I blame those, who ignorantly or dishonestly conjure up grievances, which have no existence. I blame those, who, instead of informing the understanding, and guiding the judgment, of the people, to propriety and usefulness, inflame their passions, and lead them, by their prejudices, to error and mischief. And I blame all combinations, not established by public authority, who assume to themselves any representative influence, or ascribe to their opinions any greater force, than is due to them in their individual capacity.

Those who have argued against all associations, have stated, with some plausibility, this objection to them.—“They establish a consideration of interest, separate from that of the general interest of the nation; and a connection and attachment between the members, separate from that which arises from their being of the same state. So that in choosing men for offices, the minds of the members are not free, but under the bias of this subordinate attachment; and against a candidate, who is of the society, a candidate of equal worth, not of the society, will have no chance for the votes of the members of the society; and, by the members of the society, a candidate of less worth, in the society, will be preferred to a candidate of greater worth, out of the society; the attachment of the society overbalancing the superiority of worth. Thus, so far as the influence of the members can extend, a monopoly of offices is possessed by the society, and a sort of aristocracy is established in the society: each member of it possessing more influence, as a member, than he would possess, in his individual capacity of a citizen.”

This subordinate attachment, to fellow members, seems to pervade all societies. There have been times, in which a man could hardly be elected into an office, in some counties, unless he were a Quaker, in other counties, unless he were a Presbyterian: in some counties, the officers must all be of German, in others, all of Irish extraction. In some counties certain family connections sway every election. And, in almost every county, skilful *electioneering men* court the influence of

the different interests, more or less, according to their strength, by naming certain of their members for offices. Let us lay aside all these petty distinctions, and narrow affections, and regard each other only as citizens.

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But waving the consideration, that combinations establish an undue influence on the minds of the members; may we not fear that they establish an undue influence on the minds of others? May we not fear, that the opinions of the society have more weight, than the individual uncombined opinions of all its members; and that the opinion of only some of its members, and those, perhaps, the least worthy, acquires the weight of the opinion of the society? And is not this the more to be regretted, when we consider, how those meetings are often composed?

For, when there is no authority requiring attendance on those meetings, or associations, it often happens, that *many* of the most modest, *many* of the most honest, *many* of the most sensible, and *many* of the best informed, of the citizens, do not attend them. *All* the pragmatistical, intriguing, vain, conceited, and *popularity-hunting* men, do attend them. The most ambitious, and the most violent, take the lead. Even by falsehood and error, confidently and publicly declared, the modest may be silenced, and the weak convinced, and the uninformed may be persuaded, that it is the general opinion. The voice of those meetings is called the voice of the people; and their authors and leaders become the patriots of the day, the darlings of the people, the oracles of political wisdom, and the successful candidates or recommenders for office.

We had an unhappy instance of this in the late insurrection. A set of mushroom patriots, whose voice had never before been heard, nor influence felt, sprung up at once, and became candidates, or supporters of candidates, for office. With nothing to recommend them, but ignorance, impudence, and violence; by seizing the prejudices, and working on the passions of the people, they acquired all the influence of virtue, wisdom, and patriotism. And, at the crisis, when this country stood on the brink of destruction, when the awful question of war or submission was agitated: those men, against the



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most palpable conviction, at the hazard of general ruin, and from no other motive, but to maintain their influence at the approaching election, laboured, with a diabolical industry and perseverance, to keep up the prejudices and the passions of the people. Though their exertions had not all the mischievous consequences, to have been apprehended from them, they, unhappily, prevailed so far, as to prevent that evidence of general submission, which government required, and brought an army into this country.

May the existence of all such men be short, as of the gourd of Jonah. As they come up in a night, may they perish in a night. Let all such men, and all improper motives and means of acquiring popularity, and all insidious approaches to office and appointment, be guarded against, discountenanced, and suppressed. Let contempt and detestation be the reward of those, who seek popularity, by seizing the temporary passions of the people. Let integrity, wisdom, and a firm pursuit of public good, without respect to popularity, be the only means of influence or success in elections. The exercise of a constitutional right, and conscientious duty, is too important to be prostituted to the deceitful practices of unworthy men.

Who, with the least spark of public spirit in his breast, can think, without indignation, on the many base acts, which have disgraced our elections, contaminated the source of our administration, and stained our character as citizens? The man, who can gain a vote, by a contrived falsehood, a deceitful trick, or an imposition on the ignorant or unwary, boasts of his success, as a laudable specimen of dexterity; and is heard or detected, with as little disgust, as if he cheated at a gambling table, a horse race, or a jockeying match. Those, who have no right to vote, are imposed on the inspectors; a voter will vote several times, or give in several tickets at once; and strange to tell! even the election officers, forgetting their oath, and their sacred trust, will become principals or accomplices in frauds: and these detestable violations of public virtue, like the lying miracles of a false religion, will receive a palliating name. So despicable is our meanness, that we think it no affront to our honour and dignity as electors, if the candidates for

office appear on the election ground, with spiritous liquors, as the best evidence of their merit, and solicit our votes, by seducing us to intoxication. How can we expect, that our officers should regard our interests, when, in our own hands, we treat them with so little respect? Shall we any longer wonder at the corruption of foreign governments, or the waste, which kings make of the rights of their people, when we, exercising our own rights, prostitute them to such pollutions?—Where shall liberty, where shall virtue, fly for refuge when in a democracy, they are thus trodden under foot!

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If any remnants of those sacred names be yet left among us; if their influence has not altogether abandoned us; let us call them back; let us rouse from our depravity, and obliterate our shame.

Lately, I have often regretted, that the constitution has established election by ballot; since this mode is more liable to fraud, than the open manner of voting *viva voce*; and the equal distribution of property among us is sufficient to secure independence in voters. But, as this remedy cannot now be applied to, let us seek out, for our election officers, men who entertain a sense of the importance of the duty, and possess hearts above the reach of corruption, and heads above the reach of deceit. And let us all come forward to elections, under this solemn impression, that we are about to exercise a public trust of a sovereign nature, and exert an act of judicial authority; and that, in the discharge of this public duty, we are bound, in honour and conscience, to act for the public good, without any view to private affections or ends, no less strongly, than if we were bound by oath.

What! you will say, is not the right of voting our privilege, and may we not use it, as we please? The right of voting is our privilege, and we may use it, as we please: but, for the use of it, we are accountable, to our conscience, our country, and our God. Our liberty of voting is like our liberty of acting on other important occasions: we are free to vote improperly, as we are free to act so, as to be hanged here, and damned hereafter.

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Let all private passions, interest, affection, or enmity, therefore, be laid aside : blind to every thing, but the public good, we should consider ourselves as divested of all sentiments, as men, and act only as citizens on public duty.

In selecting the men, whom we are to honour with our votes, let us remember, that integrity, talents, and public spirit, must be united. Without public spirit, to induce exertion, talents and integrity, wanting a spur to excite them, will be inactive ; and the officer will be indolent and useless. In choosing men of ignorance or weakness, however honest ; we but furnish tools, for knaves to work with. In my experience of the world, I have doubted, whether more mischief has not been done, by folly, than by villainy, and whether the blunders of the one are not more to be feared, than the frauds of the other. Place a man of sense, though without honesty, in a public station, and self interest, a fear of detection, may restrain his vices. But I know no restraint for the folly of fools. I shall not be understood, as giving any sanction to the choice of unprincipled men ; but only cautioning against considering honesty as a recommendation of weakness.

With talents, honesty, industry, and public spirit, the candidate for office ought to possess firmness and independence. Unawed by opinion, he must have courage to do his duty, and to shrink from no responsibility annexed to his station. Those political weathercocks, who tremble at every breeze, and point always to the fluttering gale of popularity, are unworthy of confidence, and ought to be constantly rejected from office. Mark the man, whose constant aim is to please, and trust him not ; for he will surely deceive you, when he can do it without discovery. Mark also the man, whose aim, without respect to pleasing, is to be useful ; for him you may trust.

Let us put out of fashion the practice of candidates running about the country, soliciting votes and interest for their election. Strongly suspicious, that he has in view something else than public good, let us never vote for a man, who descends to do this. And let us mark, with sure and constant reprobation, the candidate, who pollutes the election ground, with liquors and entertainments.



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Distrust the candidate, who accosts you with smiles and flattery. Avoid him, who industriously throws himself in your way, and seeks occasion to learn your sentiments, respecting his election, and conciliate your good will to his success. The independent honest man, whose true wish is to serve the public, will feel, that his fellow citizens, if they choose him for their confidence, will seek him out, and that it is not sufficiently respectful, to solicit for himself.

Cast off, with disdain, those *hangers-on*, who pursue your steps on the election day, to watch your conduct, and influence your mind. And reject those busy meddlers, who pry into your tickets, or endeavour to press your votes into their service.

Remember, that, in elections, you are acting a part of sovereign authority, are exercising an important trust over your own rights, and are bound, by the most sacred ties, to do it impartially, for the public good. Remember also, that not only your own interest and honour, but the interest and honour of democracy in general is deeply concerned. For if the people themselves, having the power of election in their hands, fill offices with ignorant or unworthy men, do they not proclaim to the world, that the principles of democracy are not worth contending for; and that it is the interest of all nations, to be content with whatever government, they may happen to have, since a change, on the most popular principles, is no security for a good administration.—When I think of the base, the ignorant, and the worthless men, who have sought and received from the people, appointments to offices of the highest importance; I blush for our character as a people, and sigh for the cause of liberty.

Perhaps these observations may be unkindly considered as impertinent deviations from my line of duty, and may be called insolent dictating, in matters which do not concern me. They do concern me, for every citizen is concerned in the vote of every other, which, though not under his controul, as much affects his interest, as his own vote; and no citizen, by becoming an officer, loses any privilege of a citizen. Though no officer has a right to employ his official situation, to gratify his own

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private views ; yet the officer, who confines himself to the strict duties of his station, seems to me to be less useful, than he who seizes those opportunities, which his station affords him, to do good actions, or communicate good advice. On this account, I have the consolation to know, however these suggestions may be received, that they proceed from no selfish motive, and are directed to no private end. They proceed from an honest respect for the principles of our government, and a sincere desire, that its prosperity, be promoted.

## No. XVI.

### *Nature and Modification of a Representative democracy.*

*March*  
*Sessions.*  
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A WRITER, who, in a remarkable degree, possesses the faculty of placing common subjects in a new light, instead of the usual arrangement of governments, reduces them to two, a government by representation, and a government by hereditary succession. Some would distinguish a democracy, in which the people themselves make the laws, from a democracy in which the people choose representatives, to make the laws, by calling the last a republic. But this name is given to governments, which have but little in them of the democratic principle, and partake more or less of the other principles of government. It is given to the government of Venice, and to the former government of Holland. Even Poland, before the revolution of 1791, though it had a king, was called a republic. As I do not, therefore think, that the name *republic* sufficiently characterises the genius or principles of the government, neither do I think, that the principle of representation so changes the genius of democracy, as to render it improper to say, that a government, in which the people choose representatives, to make laws, is a democracy. I think it a democracy, though not an immediate one. Without pretending to critical propriety in the distinc-

tion, I would say, that it is a *mere democracy*, when all the people assemble personally, to exercise all the powers of government; an *immediate democracy*, when the people themselves assemble to make laws; and a *representative democracy*, when the people assemble only to elect representatives, who are to make and execute the laws. I conceive, the principle of representation, may be more or less complex, without changing the principle, but only the form, of democracy; and the government is democratic, if the people appoint those, who are to exercise, or to substitute those who shall exercise the public authority.

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I therefore call the government, both state and federal, under which we live, a democracy; because the people choose those persons, who exercise, or who appoint officers to exercise all legislative and executive authority. This authority is exercised under prescribed rules, as to its extent and duration, and, at periods, reverts to new delegations from the people. So that, immediately or ultimately, all power is in the people; and wherever it is so, there is democracy.

A mere or immediate democracy can exist only among a very few persons, and within very narrow bounds. Even a congregation, a township, or a borough, find the immediate exercise of public authority inconvenient or impracticable, and delegate more or less of their power, to agents or officers. To convene the whole people of a county, to deliberate and confer together on every, or on any, subject; and to collect the general will, would be, at least, a matter of great difficulty. But to convene for this purpose, the whole people of a state, or of the United States, is as absurd in supposition, as it would be impossible in practice. What then is to be done, by a numerous and extended people, living under one government? They must choose representatives or agents, in whom they have confidence, to deliberate, determine, and act for them.

On principle, every representative or agent, elected by the citizens, ought to be elected by all the citizens within the jurisdiction, for which he is appointed. The authority of the president of the United States extends over all the States; it is, therefore, properly prescribed,



*March Sess.* that he shall be appointed by electors, chosen by the  
 1796. citizens of all the States. As the vote of any one member of congress may affect every citizen of the United States, and the vote of any one member of assembly may affect every citizen of this state; it would follow, on the same principle, that every citizen of the United States ought to have a vote in the election of every member of congress, and every citizen of this state ought to have a vote in the election of every member of assembly.

To an imperfect being, like man, no perfect system can be adapted; and every principle, however admirable in the abstract, must be modified in the practice, according to the subject to which it is applied; and must be followed, only so far as it can be usefully and safely followed. In the case of the president of the United States, the principle is sufficiently practicable. There is but one representative or public agent to be chosen, and, of several persons conspicuous throughout the United States, there may be, as there now is, one, who, more than any other, will unite the votes of all the citizens and electors. But to say, that every citizen in this county shall vote for every member of assembly from the county of Philadelphia, or that every citizen of Georgia shall vote for every member of congress from New-Hampshire, would be ridiculous. That the representative or agent possess, as he ought to possess, the confidence of those who appoint him, the power of election ought to be accompanied with the means of information. For it is just as rational, to throw up dice for representatives, as to vote for those, to whose character we are strangers. The limits of election ought, therefore, not to exceed the limits of information; that every man may be reasonably informed, respecting every representative for whom he votes. Where the jurisdiction is extensive, and the representatives to be chosen are numerous, this becomes impossible, unless each citizen were to choose all the representatives within the circle of his own information. But a representation of this kind would be precarious, and would never produce general confidence. The principle, therefore, becoming impracticable, dangerous, or useless, must be controuled by convenience, and adapted to its subject. The usual modification of it,

and the modification adopted in our government, is, to divide the extent of jurisdiction into districts, giving a power to the citizens of each district, to choose such a number of the representatives, as bears the same proportion to the whole number of representatives, that the number of the citizens of the district bears to the whole number of citizens. Thus the whole Union is divided into states, and each state into counties. The citizens of each county choose its proportion of members of assembly; and the citizens of each state choose its proportion of members of congress. Though the members of congress chosen in each state be far less numerous, than the members of assembly chosen therein; yet a state may be so extensive, and its members of congress so numerous, that each citizen may not have reasonable means of information to enable him to vote, with judgment, for every member of congress, to be chosen, within it. In this state, therefore (and in many other states) with a view to the election of members of congress, there is another distribution into districts composed of counties; and the citizens of each district vote for such a number of members of congress, as bears the same proportion to the whole number of members of congress chosen in the state, that the number of citizens in the district bears to the whole number of citizens in the state.

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This modification of the principle is accompanied with some practical evils. When the limits of election are narrow, improper persons, who neither possess nor deserve general confidence, presuming on their popularity in their own neighbourhood, set themselves up as candidates for duties, which they cannot fulfil; and the electors too often sacrifice the public interest to the shameless solicitations of such candidates. If candidates had modesty enough, to seek only such offices, as they are qualified to fill; and if citizens had virtue enough, to choose only such persons, as are qualified for the offices to be filled, this evil might be removed.

Another evil, which results from this modification of the principle, in having a representative chosen by only a district of the jurisdiction, by a part only of those who are affected by his authority, is a misapprehension of the relation of representative and constituent. The representative is apt to consider himself as the agent of that

*March Sess.* district alone, which elected him ; and the citizens of  
 1796. that district consider themselves as his only constituents.  
 Hence, instead of extending his desire and endeavours, to promote the wishes and interests of all within the jurisdiction, it too often happens, that he confines his views to that district only, in which he was chosen.— And the citizens of that district, instead of viewing him as bound to consult the will and the interest of all the citizens within the jurisdiction ; too often expect, that he should consult only their will and interest. This is a false sentiment. That a member of assembly, having power to vote for a law to bind every citizen in this state, should be chosen by the citizens of this county only ; or that a member of congress, having power to vote for a law to bind all the citizens of the United States, should be chosen by the citizens of this state only ; is, on principle, altogether wrong, and is admitted only from the necessity of a practicable election.— But this necessity ceasing with the election of the member, the violation of principle ought to cease also ; and immediately after his election, the member ought to consider himself as the representative of all the citizens on whom his vote can operate, and bound to consult the will and interest of all within the jurisdiction. It is a mean and narrow view of himself, that a member of assembly takes, when he considers the citizens of that county alone, which elected him, as his only constituents ; and it is a mean and narrow view of himself, that a member of congress takes, when he considers the citizens of that state alone, which elected him, as his only constituents. Such views of relation and duty cramp the efforts and talents of representatives, and produce a selfish, partial, and jarring system of legislation. Every member of assembly ought to study and promote the interest of the whole state, and every member of congress ought to study and promote the interest of the whole Union. For it surely is a principle, that duty ought to be co-extensive with authority. A representative, chosen by a particular district, is as much a representative of the whole jurisdiction, as an arbitrator, chosen by one of the parties, is the arbitrator of all the parties. The representative, like the arbitrator, by whomsoever chosen, is vested with a controul over the



whole subject submitted to him, and bound, not to favor *March Sess.* those who appointed him, but to do right to all, who *1796.* may be affected by his decision. And it is by this general scale, that the conduct of every representative ought to be measured.

But the same narrow view of this relation of constituent and representative, which occasions errors in the representative, frequently also occasions complaints and censure among the constituents. A representative is charged with having opposed the will or the interest of his constituents, when he has only opposed the will or the interest of the county, district, or state, which elected him; and perhaps has closely, honestly, and wisely, pursued and promoted the general will of the state or the Union. If he has done this, every honest and intelligent citizen will say, that he has done his duty, and deserves praise and confidence.

A delicate question may here be supposed, respecting the duty of a representative. Is it merely ministerial, or is it judicial or discretionary? Is he bound by the will of his constituents, or is he not?

In which ever way this question is to be answered, another must first be attended to: how is he to know the will of his constituents? I consider it as settled and certain, that the constituents of each representative are all the citizens within the jurisdiction, for which he is appointed. The constituents of each member of assembly, therefore, are all the citizens of this state; and the constituents of each member of congress are all the citizens of the United States. The difficulty then, which presents itself, of every representative knowing the will of his constituents, is great, if not insuperable. How shall a member of congress discover truly the will of the whole mass of the citizens of the United States? Is he to learn it from the prevailing opinion of the society or neighbourhood, in which he lives? This is taking the will of but a very small part of his constituents, and narrowing the limits of his duty far within the limits of his authority. In an extended country, with varied interests, opinions must differ in almost every neighbourhood; and hardly may any one be safely taken as a just standard of the general opinion. Is he to learn it from paragraphs and essays in the news-

*March Seff.* papers ? These are often the whims of the singular, the reveries of the speculative, or the reflections of the ignorant ; and perhaps not the opinions of even their authors. Is he to take it from the resolutions of societies and town-meetings ? These are sometimes the work of the factious, the presumptuous, and the selfish ; and are no certain criterion of the general will of the people.

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Passing from the difficulty of a representative ascertaining the will of his constituents, let us consider its obligation on his deliberations and decisions. Is he bound to a strict conformity to it ? He has an important deliberative duty assigned to him, which he ought to discharge to the best of his knowledge and judgment. It would seem, therefore, that his own mind ought to be satisfied of the propriety of his determinations ; and that it is not sufficient, that he act mechanically and from impulse. The great, if not insuperable, difficulty of ascertaining the true will of his constituents must necessarily leave a great deal to his own judgment and conscientious discretion. If even he were sure, that he had ascertained the true will of his constituents ; how can he be sure, that they possessed the information necessary to form a right opinion on the subject, and that they would not think differently, if they possessed all the information, that he possessed ? Without any express obligation on the representative, his constituents have a sufficient security, that he will consult their true will and interest, from his dependence on their good opinion. And besides the general authority delegated to him, to deliberate and determine for them, he has an individual authority and interest of his own, as a citizen, which they cannot transfer or controul.

These considerations have great weight. But, as representation is an epitome or abstract of the people, for the purpose of ascertaining the general will ; I conceive it to be the duty of the representative, if he can ascertain the general will of his constituents, to act, in his representative capacity, as, supposing them to possess all the information that he possesses, and to act honestly and wisely, he believes they would act, if they were to act personally. In this manner, the will of the people is made known, and the government is a representative democracy.

1. From the nature of a representative democracy, it *March Seff.* seems to follow, that the only way in which the will of the people can be known is through their representatives. The adoption of the principle of representation proves, that this is the only way in which the will of the people can be truly and rightly declared; and the power of election seems to secure, from their representatives, a just declaration of the will of the people. It seems to me impossible, that a representation founded on so extended a basis, as the representation in our government, should speak any thing but the will of the people. Is there any man, or number of men, better qualified, or more interested, to speak the will of the people, than representatives chosen by the people, for that purpose, and dependent on the people, for being continued in their appointment? If they would retain their appointment, they must look to the approbation of the people; if their appointment cease, they become part of the people, and must be governed by their own laws. Their interest is the same, with that of their constituents; and representation supposes, that the representatives are the best organs of the will of the people. 1796.

2. In a representative democracy, when we speak of the people, we mean all the citizens, in their aggregate, collective, or corporate capacity. A political, like a commercial, association, may consist of many members, but they are all one body. The citizens are many, but they are one people; and, as a people, can have but one will, expressed by their representatives. There is no other way but this, of expressing the will of the people. *The people* is the corporate name of the political body, and means a different number of citizens, according to the subject. If the subject relates only to a township, it means all the citizens of that township; if to a county, all the citizens of that county; if to a state, all the citizens of that state; and if to the Union, all the citizens of the Union. When we observe, therefore, men in conversations, in newspapers, in societies, or in town-meetings, affect to speak the will of the people, we must consider this as meaning no more, than the will of those citizens, who speak or assent to it; and whether theirs be the will of the people, may be known, by comparing them, with all the citizens concerned in the subject;



*March Seff.* whether it relate to a township, a county, a state, or the  
 1796. Union. No man can speak for another, without authority; and no man, but their representatives, has authority to speak for the people. And an attentive observer will find, that the will of the people is more faithfully and truly declared by the legitimate representatives and agents of the people, than by any number of unauthorised individuals.

3. In a representative democracy, every public officer, deriving his appointment, mediately, or immediately, from the people, and his authority from their will expressed in their constitution and laws, is a representative or agent of the people, as to all things, to which his authority extends.

4. When we reflect, that in a representative democracy, the agents or representatives of the people are the legitimate organs of the people, and that the will of those agents is the constitutional will of the people; when we reflect, that the public agents or representatives are chosen by the people, are dependent on them for their authority, and have themselves a personal interest in the welfare of the whole community; when we reflect on the vast number of citizens of which the people is composed, the great variety of opinions; that must exist among them, and the impossibility of their uniting in one sentiment; when we reflect on the almost unsurmountable difficulty of ascertaining the general will of the people, the improbability, that any one individual or neighbourhood can competently judge of it, and the better opportunity, which the public agent or representative has of information, respecting both the public will, and the public interest; when together with the personal interest and public dependence of the agent or representative of the people, we reflect on that regard to reputation, which a public station tends to inspire; we shall be persuaded, that a confidence in the conduct of public agents and representatives will best promote the peace, happiness, and prosperity of the people, and best preserve the purity of the government; that groundless jealousy of the agents or representatives of the people has a tendency to drive honest, able, and disinterested men of sensibility, from public stations, and leave them to be filled by the ignorant, the selfish, the dissem-

bling, and the shameless, to introduce a fickle and discordant system of measures, and to pervert the nature of the government. Examine, with jealousy, the conduct of every candidate for office, and never appoint, but where you can confide. But appointment is a pledge of confidence, and the officer or representative has a right to expect, that it should be continued to him, till he has forfeited his claim to it, by certain misconduct, or ill intention. A constant regard to the public good, a careful and conscientious choice, of public officers, and a reasonable confidence in them, when chosen, are the life and nourishment of a representative democracy.— And experience will shew, that suspicion, distrust, or groundless jealousy, is the canker, which will eat out the principles of democracy, introduce selfishness and corruption, destroy all stability and uniformity of public measures, defeat the ends, and pervert the principles, of a government by representation, and render another and less free system necessary to secure the benefits of society.

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You and we, gentlemen, are now vested with authority from the people of this state, to exercise a public trust, in which each of us has a particular duty. We have a right to receive from our fellow citizens, and we ought to give to each other, the confidence due to men vested with such authority. Let us proceed to our several duties, with that prudence, integrity, and spirit, which our present station, as public agents, demands, and with that mutual respect, which such principles ought to inspire.

## No. XVII.

Delivered (together with No. VII.) to the Grand Jury of Allegheny County.

*Abuse of Fairs.*

June  
Sessions.  
1796.

YOU have probably seen an advertisement, in the gazette, and in printed handbills, of a fair to be held in this place, at this time. This, though not strictly regular, is, I presume, under that part of the law incorporating the borough of Pittsburgh, which authorises fairs. Such clauses are common in borough corporation laws, and are servilely copied from Europe. In Britain, a fair or market is held by grant or patent from the crown. In imitation of this, an authority for holding fairs is given here, among other privileges or authorities, to boroughs, when they are incorporated by law. In Europe, a fair or market is for the purpose of trade, buying and selling. Vast quantities of merchandize and manufactures, as well as horses and other cattle, are brought to fairs for sale. Great part of the buying and selling of many things, and almost the whole of some things, is transacted at fairs. Debts are made payable at fairs. And these are occasions, on which people expect to find those, with whom they have business to transact. So that, in Europe, fairs are established and conducted for useful purposes.

The only fair I have seen in this country is that which was held here last June, as now, during the court. An unusual number of idle people were assembled, strolling through the town, from tavern to tavern, drinking, dancing, and exerting themselves to be noisy. Horse races were exhibited and repeated from day to day. Indeed, some people seem to consider a horse race, and a fair, as the same thing. From that specimen of a fair, I am disposed to think, that, in this country, a fair is another word for a nuisance; and I think it ought to be considered as such; and the promoters of it, as promoters of disturbance of the peace. To collect together a number of people, on an occasion, and in a situa-



tion, in which most of the restraints of decorum, and many of decency, are cast off, and where number, promiscuous intercourse, and mutual example, promote the violation of any little decorum or decency, which may remain, has surely a tendency to produce offences, and, in my eye, is not innocent. To do this too, at a time not prescribed by law, when the constituted authorities, and the citizens in general, are occupied with the administration of justice, seems to be an aggravation of the offence. As fairs are held here, they are not necessary, they are clearly useless, they are probably dangerous, and, in my opinion, they are real evils, and ought to be avoided and abolished.

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In the advertisement of the fair, at this time, in order to excite the curiosity of the ignorant, and draw out the idle and the worthless, there is an intimation of horse races, and of rope-dancing by some vagrants, who collecting wealth from the folly of fools, and assembling crouds for idleness and mischief, may be ranked, with gamblers and sharpers, as the blood-suckers and corrupters of society.

Were there no act of assembly (as there is) forbidding it, to gallop a horse, in a town, has so plain a tendency to mischief, that it is surely an offence. I am disposed to think, that idly and wantonly doing so, on a public road, where people travel, ought to be considered in the same light. If, therefore, any horse races should be attempted in this town, or, I would also add, on a public road, I think it the duty of every magistrate, to have the persons concerned apprehended, to answer for their misdemeanor. By an act of assembly, horse racing for bets, or wagers, or prizes, of money or any other thing of value, is punishable with a fine. To this circumstance, it will also be the duty of every magistrate to attend.

Your duty, gentlemen, on this occasion, will be, while you continue to sit, to watch over the laws, and the peace of this county; and, wherever you find any violation of them, make a presentment of it, that the guilty may be punished. Enforce, by your example and authority, decency of manners as one of the best preferatives of virtue.

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1796. If you go farther, and, to prevent all occasions of the like kind here for the future, unite in a petition to the legislature, to repeal, as useless and dangerous, that part of the law incorporating Pittsburgh, which authorizes fairs; I think you will have the approbation of all the thinking, sensible, and good citizens of this borough.

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## No. XVIII.

### *Distribution of the Sovereignty in a Constitutional Government.*

*September Sessions.*  
1796. **I**N every independent nation, whatever be the form of its government, there exists, somewhere, a sovereignty or supreme power, which, it is said, resides wherever the power of making laws is placed. It is, therefore said, that sovereignty and legislature are convertible terms, and that one cannot subsist without the other: for, wherever the power of making laws resides, all others must conform to it, and be directed by it; and it is, at any time, in the option of the legislature to alter the form and administration of the government, by a new rule.\*

As Blackstone, the distinguished author whose sentiments I quote, had in view the delineation of the British government; it is probable, that those sentiments sprung from that view. Accordingly, he considers the sovereignty as lodged in the British parliament, composed of king, lords, and commons; and to parliament he ascribes absolute and despotic power; power to alter the succession to the crown, the established religion, or even the constitution of the kingdom and parliament; in short, power, uncontrolled by any authority upon earth, to do every thing not naturally impossible.†

Vattel, while, supposing an attempt of the two houses of parliament, to vest the king with absolute power, he

\* 1 Comm. 46, 49.

† *Ib.* 50, 160.—but see *ib.* 41. 91. *Hob.* 87.

asserts, that the nation has a right to oppose it, admits, that silence in the nation would be considered as an approbation of the act of its representatives. But, in laying down general rules, he, on better principles, denies, that the legislature has any authority to change the constitution, or fundamental laws.\*

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Locke admits, that, while the government subsists, the legislature is the supreme power; but considering the legislative power as only a trust, for attaining the public good, he holds, that when the legislative is altered, as where any branch of the government, not authorised for that purpose, takes on itself to make or annul laws; or when the legislative acts contrary to its trust, as where it violates the indefeasible rights of the subjects; the government is dissolved; the delegation of the people, the foundation of all authority, is gone, force only, without authority, remains, resistance becomes lawful, and all its consequences are chargeable to the usurper, not to the resister of usurpation, and the people have a right to remove, or alter the legislative. "And thus the community may be said, in this respect, to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place, till the government be dissolved.†"

These sentiments of Locke, however just in theory, yet, as tending to anarchy, and the annihilation of all law, Blackstone considers as improper, for practical adoption, in any system of government.‡

The opinion of Blackstone, respecting the omnipotence of the British parliament, must be formed upon this ground, that, in Britain, there are no fundamental laws established by any higher or other authority than parliament itself; and that, of course, the power which made, may alter. The opinions of Vattel and Locke proceed on a supposition, that there are fundamental laws, restraining the authority of the legislature, and subject only to the authority of the community or nation. The distinction, then, is between a nation which

\* *Law of Nations*, B. I. c. 1. § 32, 34.

† *Essay on Government*, B. II. c. 13. § 149, 150, c. 19.

‡ 1. *Comm.* 52, 161.



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has a constitution, and a nation which has none. Where there is a constitution, the legislature has a qualified sovereignty; and a power to do any thing not forbidden by the constitution. Where there is no constitution, there is, of course, no constituted authority to restrain the legislature, and it possesses sovereignty, or supreme power. So is the sovereignty exercised, while the government continues in a settled state. But there rests always, in the whole nation or people, a power to take on themselves the sovereignty, and to change the constitution or the legislature. But this power, from the delicacy and danger of its assumption, Blackstone hesitates to admit, contemplate, or define.

The states of America have express fundamental laws, or written constitutions, which declare the source, and the power of alteration, of government to be in the people; recognise certain indefeasible rights in the citizens, and prescribe limits to the different branches of their governments. The constitution of Pennsylvania expressly ascertains those articles.

If by sovereignty be meant supreme power, by this must be meant supreme law or authority; and if sovereignty and legislature be convertible terms, and there be degrees of legislature, sovereignty must reside in that legislative, which has authority to make supreme law. Where there are fundamental laws, or a constitution, the sovereignty cannot reside in the ordinary legislature; for this legislature has not power to alter the constitution; therefore it has not sovereignty or supreme power. The constitution controuls the ordinary legislature, and is a law paramount to any law that can be made by this legislature. But the constitution itself may be altered by the nation or people. The nation or people, therefore is the supreme legislative, and the will of the nation, expressed in the constitution, is the supreme law. Thus, the constitution is the sovereignty; and, as the nation or people have the power of declaring it, the sovereign power may be said to reside with the nation or people.

But this sovereign power in the people is never exercised by them, when the government is in a settled state. This sovereignty in the nation or people, is, I will say, a sovereignty in the last resort, a right in remainder or reversion. The sovereignty is their estate or right, the

exercise or enjoyment of which they have parted with, *Sept. Sess.*  
 on certain terms, and transferred to agents, delegates, or *1796.*  
 representatives. This divesting and transfer of sovereignty has, in the states of America, usually been made by transferring to a convention of delegates, a power to establish a constitution or fundamental laws, in which the sovereignty of the nation is to be deposited, and which shall prescribe the forms and limitations under which the constitution shall be administered, and the sovereignty of the nation exercised or enjoyed. By submitting to this constitution, the people divest themselves of all authority, not therein reserved to them, and transfer it to this constitution and its administration. Revolution ceasing, government succeeds. The people no longer exercise the sovereignty themselves, but give it up to the constitution and according to its limitations, to their agents, delegates, or representatives under it. The people may change this constitution; but, while they permit it to subsist, they acknowledge its authority, and have no right to resist its dictates, nor oppose the constitutional acts of any branch of its administration. They are bound by their own act, and subjects to their own will, the constitution.

Under a settled government, therefore, with a constitution, and while it subsists, the sovereignty or supreme power is in the constitution. It is not in the legislature, nor in any other branch of the government: for the legislature, and all the branches of the government, are mutually controuled by each other, all subject to the constitution, and unable to effect any thing contrary to it. It is not in the people; for, until they annul, they cannot contradict any part of the constitution, or its lawful administration. Different portions of power are distributed, by the constitution, to the different branches of its administration; and the administration of those powers may be considered as the exercise of portions of the sovereignty. In the nation, or the whole people, resides a revolutionary sovereignty, a power, on general consultation, to annul the constitution, and change the whole frame of the government. And this, being the highest act of authority, may, strictly, be considered as the sovereignty.

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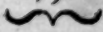
The different portions of sovereignty, distributed, by our constitutions, into different branches, may be named the legislative, or power to make laws ; the judiciary, or power to interpret and apply laws ; the executive, or power to execute laws ; and the elective, or power to appoint to office. The first is in the hands of the legislature ; the second in the hands of the judges or courts ; the third in the hands of one or more magistrates supreme and subordinate ; and the last is in the hands of the people, or of the other branches of the government. The whole compose the administration of the constitution, and, in their several functions, each may be considered as a distinct branch of the government, vested with a distinct portion of the sovereignty.

In England, the king is considered as the source of all power, he calls the parliament his ; and, at the opening of every new parliament, the speaker of the house of commons demands of the king freedom of speech. But our political system is founded on no such presumption of superiority, in any branch of our government ; but on a presumption of equality in every branch. The legislature is not the sovereign ; for it is subject to the constitution, and, according to the constitution, controuled by the other branches : the executive may resist, and the judiciary may annul, any unconstitutional act of the legislature. The executive is not the sovereign ; for it is subject to the constitution, and to the constitutional acts of the legislature. So is the judiciary ; and so is the elective branch. The constitution is the sovereignty, and every branch of the administration is the subject of the constitution ; but every branch of the administration, as agent of the constitution or the sovereignty, is, with respect to every other, equal and independent, in the exercise of the portion of sovereignty committed to its administration. Within its limitation of power, no branch can be controuled by the others. But the authority of each is limited, and beyond its limitation no branch can act. The legislature can make no law contrary to the principles of the constitution. The judiciary is bound to give judgment according to law. The executive cannot exceed the authority given it, by the constitution, or an act of the legislature, or of the judiciary. Nor can the people, nor any branch of the go-



vernment appoint to any office, a person legally disqualified to fill it. Thus the constitution, and the authority derived under it, controuls and bounds all. When any branch of the government does an act, which it has authority to do, the act is valid, and every other branch is bound by it. When any branch of the government does an act, which it has not authority to do, the act is void, and no obedience is due to it. When any branch of the government is engaged in the exercise of its authority, it is to be respected, as a part of the sovereignty of the constitution, and as a representation of the people. When any branch of the government steps beyond its authority, and undertakes to deliberate and act beyond its constitutional limits, and deliberates and acts on subjects not submitted to it by the constitution, then it ceases to be a representation of the people; its deliberations and acts derive no authority or respect from the constitution, and deserve no more regard from the other branches of the government, than the deliberations and acts of any other unauthorised individuals; and it is, in this respect, no branch of the government, but (to use an expression perhaps become threadbare) "a self created society," destitute of all public authority. Attempts of this kind, in any branch of the administration ought to be carefully watched. One encroachment indulged, forms a precedent for another. Power is, by degrees, withdrawn from those hands, in which, the nation or people had lodged it; and exercised by those to which the nation have not intrusted it; and the constitution is changed without the will of the people.— When any branch of the administration has succeeded, on a subject not committed to its discretion, to give its will the effect of a law, the legislature is changed, and, according to Locke, the government is dissolved; a rebellion has taken place against the constitution, and the sovereignty of the people; a rebellion the more atrocious, as it is under the semblance of authority, and effected by those, whose public duty it is to support that which they destroy. It is immaterial what branch of the government it is, whether the most popular or not, that succeeds in this attempt, the liberty of the people is equally destroyed, and a tyranny in this branch estab-

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*Sept. Sess.* 1796. { lished. For the liberty of the people is the constitution. The constitution is their will and sovereign act, defining the extent of their privileges, and the limits of all power. One branch usurping a power not given it by the constitution, violates the constitution; and a constitution violated will soon be a constitution destroyed. Usurpation is easier extended than begun: the barrier once broken no longer restrains; when the torrent has forced one passage, the dam is ruined; and when a breach is made in the wall, the city is despaired. If the people would preserve their liberties, they must preserve their constitution; and if they would preserve their constitution, they must see that each branch of the administration be restrained within its constitutional limits, and secured in the free exercise of its constitutional authority.

No branch of the sovereignty is more respectable, more independent, or more important, than that, in the administration of which we are now engaged, the judiciary. This branch of the government comes more home to the citizens, and bears more nearly, and with greater force, on their feelings, than any other. The manners and condition of society are much affected by it. It can, better than any other, withstand and correct the corruptions of the other branches, and give security to persons and property. It can suppress every usurpation, and many abuses of power, in the other branches. By the judiciary, the authority of every legislative or executive act may be enquired into and declared valid or void. No law can be enforced on the citizens without the interposition of the judiciary. If the legislature enact a law, repugnant to any of the principles or provisions of the constitution, any citizen affected by it, may, by calling in question the validity of any act done under it, arraign this law before the judiciary;—which has power to declare it null and void, and altogether prevent its execution.\* If any part of the ex-

\* Blackstone considers this setting of the judicial power above that of the legislature to be subversive of all government. His opinion arises from the nature of the British government, which has no written constitution, or law irrepealable by parliament. 1 Comm. 91.

ecutive do an act not warranted by law, the citizen affected by it may bring it under the examination of the judiciary, which has power to declare it null and void, and punish the officer who did it. With a good judiciary, even a bad government may be rendered tolerable; and, with a bad judiciary, a government otherwise good will be useless or destructive. Upon the character of the judiciary, in a great measure depends the internal state of the nation; and every wise nation will, for its own happiness, be careful to render its judiciary enlightened, upright, independent, and energetic.

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Every branch of the government is the agent or representative of the people; for it is the agent of the constitution, and the constitution is the will of the people. No branch of the government has any greater claim, than another, to influence, as the agent or representative of the people. All are equally organs of the constitution, or the will of the nation. To each is a portion of the sovereignty assigned by the constitution; and, in the exercise of its authority, each branch is equal and independent.

From the essential difference between the governments of the states of America, and of Britain, between a government with a constitution, and a government without one; we may see the error of applying precedents from the one government, as rules in the other. The parliament of Britain claims the whole sovereignty of the nation; not only the ordinary sovereignty, under a settled government, but the revolutionary sovereignty of the nation, the power of the whole people, when they have cast off their frame of government, to new model and alter their fundamental laws. The British parliament claims to be the British nation or people, and assumes a right to do every thing which the whole nation or people could do. And, if precedents from Britain were conclusive, an American legislature might claim to be the American people, with power to do every thing, which the American people can do.—Will any American legislature advance a claim like this? The constitution is the people, while the people permit it to exist. Every constituted authority is the people, within the extent of its authority, but no further. Beyond the extent of its authority, the legislature



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1796. is no more the people, than a single constable, beyond the extent of his. And within the extent of his authority, a single constable is as much the people, as the legislature is. The will of every constituted authority, on the subjects committed to its discretion, is the will of the people, whether that will be constitutionally spoken by the whole legislature, the whole executive, or the whole judiciary, or by only one of the branches of the legislature, by a president or governor, by a court or a single judge, or by a constable. The only question is, whether there be authority; for all authority is derived from the constitution, and the constitution is the will of the people.

It may be asked, since the people transfer their sovereignty to the constitution and its administration, is there no check on the administration, in the exercise of the authority and discretion committed to its several branches?

From the extent of authority claimed by the British parliament, it would appear that it has no check, but the physical force of the nation. However ruinous be its laws, there is no authority to oppose them, and they can only be obstructed by insurrection and revolution.

Happily for America, we have other means of redress, without recurring to an expedient, at all times dangerous, and often more injurious and destructive, than the evil to be cured. The several branches of our government, the legislature, the executive, the judiciary, and the elective, mutually restrain each other. The constitution may be peaceably changed. An unconstitutional law may be in effect annulled by the judiciary. Usurped power in the executive or the judiciary may be restrained by the legislature. An improper exercise of authority in the legislature may be corrected by the elective branch changing the representatives. Nor are the citizens ever reduced to the desperate expedient, force, till all the branches of the administration have combined against the constitution, and resisted peaceable attempts to correct errors in its administration.— If a law has been ill made, appeal to the elective branch, at the next election. If a law has been ill interpreted, appeal to the legislature, for a new law. If a law has been ill executed, appeal to the judiciary. If

a disqualified person has been elected, or appointed to an office, appeal to the proper judicial investigation.—  
Restraints, and corrections of error, in the government, or any of its branches, are thus constitutionally established; and it is hardly possible, to suppose a case, in which force is necessary in the free citizens of America.

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Usurpation of authority in the judiciary may be resisted by the executive, or corrected by the legislature. Usurpation of authority in any of the other branches may be corrected by the judiciary. Every act without authority is declared void by the judiciary. If there be authority, though the discretion be not used in the best manner, the act is valid. Acting without authority, or abusing it, is, of itself, in any officer merely ministerial, a ground of positive punishment; and, if done corruptly, dishonestly, or maliciously, may, in a judicial or discretionary officer, also be a ground of positive punishment. But in judicial or discretionary officers, a mistake of authority, or an error in judgement, is no ground of positive punishment; but may be a ground of removal from office, according to the nature of the error, and the rules of the government. An elector, who votes indiscreetly or improperly, is punishable only by the disapprobation of his fellow citizens. A representative, who votes indiscreetly or improperly, is punishable by rejection from office, by his constituents. These are constitutional checks on the administration; and, to preserve the constitution and its administration pure, these checks must be honestly applied.

Our immediate duty, however, is of a more limited nature. However occasions, like the present, may be, and I think properly, used, to state general truths and duties, our official capacity, at this time, extends only to enquiries into such breaches of positive law, as will subject the offenders to positive punishment. To this duty you will now proceed, and, as bound by your oath, discharge it diligently, truly, and impartially.

## No. XIX.

*The Constitution and Principles of our Government a security of Liberty.*

December  
Sessions,  
1796.

THAT the principles and modification of the government, under which he lives, be well understood, and its administration be examined with intelligence and candour, is of no little moment to the happiness of every citizen. For unless the government and its administration be so understood and examined, there will be no fixed rule, by which public measures can be judged. They will be distorted by the wandering imagination of the speculatist, the malignity of the factious, and the envy of the discontented ; faults will be found, without cause, and calamities deplored, which have no existence : instead of the applause of satisfaction, there will be the murmur of discontent, and repining, instead of gratitude. But in a government like ours, where the citizen has an influence and a share in its administration, a competent knowledge of the principles, and a just estimate of the administration, of the government, are necessary, not only for his happiness, but for that obedience, and civil and official duty, without which government becomes useless or corrupt.

The people of America live under a government of a complex or federate kind, like all other governments, produced by their necessities and faults ; but, even at this day, almost singular in this, that it is framed by their own will. When the combining and controuling power of Britain, which had long kept the colonies together and protected them from each other and from foreign nations, degenerating to oppression, was denied and rejected ; necessity, and a prudent regard to their own safety induced them to substitute a confederation among themselves instead of the supremacy of the mother country. And this confederation, weak and imperfect as it was, sufficed during the fervour of a revolution, and the pressure of external force, to maintain the union of the states ; for if men will be virtuous, or must be so, little energy is requisite in government. But when



danger was past, and peace returned ; when public liberty seemed no longer in hazard, and each began to look to private interest ; when zeal relaxed into selfishness, and security took place of fear ; the strong pillars of this government were shaken, the cement which held it together was dissolved, the confederation, as was then commonly said, was found to be a rope of sand : it had no strength to effect the permanent purpose of national prosperity ; and the resources of the United States were found to languish, and their safety to lie at the mercy of foreign powers. A national government, of such force as to call forth the energy, combine the exertions, and controul the perverseness of the several states, to dictate laws in all national cases, and to exhibit an united and formidable power to foreign nations, was universally demanded, as essential to the independence and prosperity of America : and thus the constitution of the United States was framed and adopted.

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In this government is vested all authority over general or national and external subjects. To this government we owe, that we are not a number of separate and hostile states, mutually hating, embarrassing, and injuring each other, unhappy at home, and contemptible abroad. And to this government we must owe the prosperity of our commerce, the payment of our debts, and our national defence.

To the government of each state is severally reserved authority over local and internal subjects, the administration of justice, and protection of persons and property within the territory of each. And to this government we owe the security of those personal enjoyments which we regard, life, liberty, reputation, and estate.

Thus the government of the union, and the government of the individual states, have each its several authority, object, and use ; and acting within its authority, and for those ends, each deserves our confidence, respect, and ready obedience.

The government of the Union, and the government of the State, in their general outlines and principles, are so nearly alike, that observations on either will generally apply to the other. They both distribute the sovereignty to different branches, ascertain and limit the authority of each, and declare and establish the pri-

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vileges of the citizen. They are not the work of accident or force, nor the exclusive and unwelcome dictates of usurping individuals; nor have they derived reverence from age, or fictitious force from superstition or miracles; but they are the maxims of reason and experience, the choice of the whole people, and must depend for their force and existence on the opinion of that people which established them, on the approbation of the sound judgment, the candour of the honest prudence, of the citizens of America. Derived from the whole people, and resting only on truth, justice, and utility, there is no select body of exclusive privileges to support them, no false arts to buoy them up, nor military array to fortify them with terror. Like virtue and knowledge, they have force, while they are respected; but they may be shaken by suspicion, and overturned by calumny; and the mischiefs occasioned by their ruin seen only in its consequences, and felt when there is no remedy.

Some other governments have been established, to promote the happiness of one or a few; but ours is established to promote the good of the whole people: and the principles necessary or proper for this purpose are laid down in the constitution, and carried into effect by the acts of the several branches of the government. It is in the constitution, and not in the opinions of individuals, that we are to discern the principles tending to the good of the people; for the constitution is the work of the whole people, the system which they have chosen to promote their happiness, the maxims by which every branch of the government must be directed, and by which only they can be tried. It is in the constitutional acts of the different branches of the government, and not in the opinions of individuals, that we can best discern the administration of the constitution tending most to the good of the people; for the branches of the government are the representatives of the people, the organs of their will, as the organs of the constitution. So various are the minds and interests of the citizens, that it is impossible, that the constitution or the laws and other acts of the government should conform to the opinions of all; but it is necessary that the opinions of all should conform to the constitution, and the acts of every part of its administration; for the constitution and its ad-

ministration, however repugnant to the opinions of some or of many citizens, must be, and be believed, the will and work of the whole people. This is one of the most sacred principles of a representative democracy, and never can be violated without endangering the safety of the government, and the peace of the citizens. This principle will therefore be fervently cherished and uniformly practised by every reflecting, wise, and good man, who regards liberty, and the maxims of a democratic government. The constitution is the standard of liberty; and a constitutional administration is a government of freedom. And, while the constitution is respected by the administration, and both by the citizens, they are false friends, and real enemies to liberty, who disseminate suspicions, and excite clamours, that liberty is in danger. However necessary a prudent *jealousy* of its administration may be, to preserve the purity of the government; it will be found, that a prudent *confidence* in its administration is not less necessary, to preserve its safety, and the peace and happiness of the citizens. While the people are vigilant and virtuous in the administration of their part of the government, there will be more danger from an unreasonable jealousy, than an unreasonable confidence, in the other branches of the administration. In governments where the people have no part in the administration; where their duty is to submit, not act; a false opinion in the people may produce no mischief, effect, or influence; for it can be corrected by the government. But here, where, besides the authority of election, not only the efficacy of its administration, but the very existence of the constitution, depends on the opinion of the people: a mistaken jealousy in the people must be mischievous, and may, at any time, overthrow the whole government; for there is no power, in any part of the administration, effectually to correct the errors of the people. A mistaken confidence, on the other hand, can, at worst, produce but a temporary evil: for an error in any other part of the administration may ultimately be corrected by the people, in the administration of their elective power. Of such importance is it, that the people be taught to think justly!

Our constitution acknowledges, in its full extent, the principle, that all government is derived from the peo-

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ple. But for the people to exercise all the power of government is impracticable, and to commit it to one man, or (which is the same thing) to one body of men, is unsafe. Where there is all power, there is no control; but the passions of men need checks and restraint. Power must therefore be balanced against power, and authority so combined with authority, that each, without obstructing or impeding another, may move in a prescribed and regular course, giving energy and use to the whole. Thus (with reverence to make the comparison) the Creator of the universe, while he gives to each orb its several circle and motion, combines the whole by their mutual attraction and their common gravitation to their central orb.

It is therefore both for convenience and safety, that the sovereignty or power of government is broken into different portions, and distributed into different hands or branches. One branch, the legislative, makes laws; another, the executive, enforces them; another, the judiciary, explains and declares them when doubted or disputed; and another, the elective, appoints citizens to occupy the other branches, and exercise their several powers. Thus the powers of the people are exercised by themselves and their deputies with safety and effect.

I. The great security of liberty is, that the legislative branch be occasionally appointed by the people, or by those whom the people choose for that purpose.— Wherever this provision is, liberty is safe: for no law can be established but by the consent of the people, that is, of their representatives. This is the utmost extent of rational liberty. Any thing farther is licentiousness, anarchy, and misery.

But a nation or people, like an individual, have their errors, their passions, and their vices. To convert every impulse of passion, every suggestion of ignorance or weakness, or every dictate of iniquity and corruption into a law, would establish a discordant and dreadful code, more ruinous than the most arbitrary despotism. Examine the giddy, tumultuary, and cruel decrees of Athens and of Rome. A people, therefore, with power, must, like a rash man with a sword, in some measure, disarm themselves, tie up their own hands, and save themselves from the mischiefs of their own will. On

this ground, they bind themselves to choose legislators, who shall be impartial, prudent, and skilful, and who shall have time for deliberation, and be independent in the exercise of their judgment. Hence the provisions in our constitution, that the people cannot choose legislators, who have not arrived at a certain age, or have not resided a certain time in the territory or district, or who hold certain offices; and that, when they have chosen them, they cannot withdraw their appointment, till the expiration of a certain period.\* All these provisions, and indeed all laws, would be useless, if the people were always wise, and always virtuous. But he, who reckons on this, reckons very falsely indeed: and constitutions and laws were framed on the supposition, that a people may be, as scripture declares that mankind is, both weak and wicked.

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As even a select body of men are but men, and, as such, may be hasty, passionate, and prejudiced, it has been thought prudent, to separate the legislators into two houses, and make the consent of each necessary to the making of a law. This, it is said, gives a better chance for deliberation, accuracy, and intelligence in our laws. It would seem, there is reason and truth in this opinion: for we see nations, who have had the experience of a legislature of a single branch, change it, for a legislature of two branches. France has done so. Pennsylvania has done so: and, though I had no sanguine expectations from this change, I am inclined to think that it is an improvement; for I have known very false measures, great favourites of one branch, prevented by the prudence of the other. On similar principles, and for its own protection, a qualified negative is given to the executive on the acts of the legislature.

A nation or people (for such is the nature of man) being often giddy, fluctuating, and rash, though they may ultimately think rightly, may hastily take up a false opinion, and receive false impressions, from the ignorant declaimer, the pretended patriot, the artful and corrupt demagogue. Were legislators exposed to the impulse

\* *U. S. Const. Art. 1, §. 2, 3, 6. Penn. Const. Art. 1, §. 2, 3, 5, 8, 18.*

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of every momentary popular passion, like a weathercock on the top of a steeple, turning to every wind, their laws would be uncertain, changing, and contradictory; their employment, like that of Penelope, would be a perpetual doing and undoing, making and repealing laws; there would be no uniformity of measures, nor steadiness in pursuit of any one. At the same time, to appoint legislators for life, or for so long a time as might be considered as equal or approaching to that period, might give too great indifference to the just sentiments, useful wishes, and true interests of the nation, and tempt to imagine or accomplish a separate interest of the legislators. To guard against both evils, the members of one house are chosen for a longer period than those of the other. The senators of the United States are chosen for six years; the senators of Pennsylvania for four years. The appointment of one third part of the senators of the United States expires every second year; the appointment of one fourth part of the senators of Pennsylvania expires every year. The members of the house of representatives of the United States are chosen for two years. The members of the house of representatives of Pennsylvania are chosen for one year. By the gradual renovation of the senate, it is presumed, that a competent number of members, acquainted with the interest of the nation, and the means of promoting it, is preserved, so as to secure a judicious and uniform system in this house. While, at the same time, the annual or biennial appointment of the house of representatives, without whose assent no law can be made, secures a sufficient regard to the opinions and interests of the citizens.— And the return of the members of both houses, after their period of appointment, to the situation of private citizens, with their connection of family and kindred, all affected by every law, so combines theirs with the general welfare, that it would be difficult for malice itself, to devise a temptation to abuse their authority, or the wit of man, to invent a stronger security for the right use of it.

As the people, at the time of an election, are liable to be seduced by misrepresentation; and as many of them are, at all times, liable to receive false impressions, and form false judgements; it has been thought, that



the senate ought to be chosen, not as the house of representatives, but by a select number of electors chosen by the people for that purpose. The senate of the United States is so chosen by the legislatures of the several states. But, even in this case, they are chosen by the people, for they are chosen by those whom the people choose to choose them. So that, ultimately, the power of appointment is in the people. Considering the extensive interests of the United States, we must think, that the period of six years service in the senate is short enough to acquire and apply a judicious experience, and that any diminution of that period would be an injury to our government, and render its administration less solid, stable, prudent, and useful. For similar reasons, it will be admitted, that allowing four years service in the senate of Pennsylvania greatly promotes the safety, efficacy, and uniformity of the administration. And there is ground to believe, that the senates of the state, and the Union, are our sheet anchors against the fluctuating blasts of levity and error, and the storms of popular violence.

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In this review of the legislative branch of our government, it appears, that the great principles of liberty are secured to the people; and that they are restrained from no liberty, except, in some cases, liberty of doing mischief to themselves. And, when such is the state of our legislative, we may justly boast of a free government.

2. But vain are laws, unless they are enforced: theory, without practice, like faith, without morality, is unprofitable. It is not more important to liberty that the people should *make* the laws, than that the people should *obey* them. Liberty is a government of laws made by the authority of the nation. And it is the same thing, whether one or a few shall dictate laws to the rest, or one or a few disobey the laws of the rest: for to disobey is to make a law; and disobedience of one is tyranny of one. That a law shall not be executed, is, in fact, that it shall be repealed. To repeal is to make a law: and if an executive shall not execute a law, the executive becomes a legislature, for it repeals a law;—and two branches of the sovereignty are united in one; the branch chosen for one purpose exercises the powers

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of another, and this amounts to usurpation and tyranny. Laws are the will of the people, a neglect or refusal to execute them is a neglect or refusal to execute the will of the people. In every view that we can take of it, we shall see, that, if it be a principle of liberty, that laws be made by the nation, it must also be a principle, that they be strictly and faithfully enforced and obeyed. Where the people have a share or an influence in making laws, they ought to know the laws, that, if good, they may be continued, or, if useless or bad, be repealed. That laws be known, they must be felt by an exact execution. No opinion, therefore, can be more false, than that a relaxed execution of the laws is favourable to liberty. This opinion is directly opposed to every principle of liberty and representative democracy. For, as to relax or suspend its execution, is to change or repeal a law, a relaxation or suspension of the execution of a law, unites the executive and legislative authority, sets the executive above the legislative, destroys the constitutional controul of the several branches (which is the safe-guard of liberty) and changes the nature of the government.— This is, in fact, what was so much reprobated in Britain, a power assumed by the king to suspend a law by a proclamation. And this is what is expressly guarded against by the constitution of this state.\*

As it is thus essential to liberty, that the laws be strictly executed, the execution of them must be committed to hands which shall have no temptation to remissness. Sense of duty is not, of itself, strong enough to bind man; interest must be united with duty: there must be an advantage in doing right, and a risk, if not a loss in doing otherwise. A certain degree of independence on the people and the other branches must be given to the executive. This branch must have a fixed duration in office, and a competent salary, to induce an abandonment of private pursuits, and a faithful devotion of time and attention to public duty. Four years is certainly a short enough duration in office for an useful discharge of the important duties of president of the United States.

A single executive is considered as necessary, or

\* *Art. 9. § 12.*

greatly conducive, to a right administration. There is a tendency, in numbers, to keep the whole in countenance in doing what any one would blush for. Participation seeming to lessen the blame, lessens the shame, of false conduct. Each hides his fault under the shade of another, and replies to censure, "you cannot say, I did it." Wrong is done; but no man is the doer. One of the strongest motives to a right administration is withdrawn, when responsibility to public opinion is withdrawn. And, to preserve this motive to a right administration (and motives to a right administration cannot be too much multiplied) and secure this responsibility, a single executive has been thought necessary. Thus, by combining responsibility and independence in the executive, an exact and faithful execution of the laws is provided for.

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3. It is essential, in the administration of government, that laws be justly and skilfully explained, declared, and applied. It is, therefore essential, that care be taken to frame a good judiciary, as a most important branch in the administration. Law, in all cultivated and commercial nations, becomes, in the progress of time, a science of deep and complex learning; and it is necessary to make it a separate profession, and to commit its interpretation to a separate body of men, whom study, experience, and reflection, have qualified for that important duty. Hence, in all countries, where a prudent provision has been made for the administration of justice, a judiciary, or select and permanent body of men, for interpreting and declaring the laws, has been established. To leave this important trust to any changing or casual body, would be ruinous to the liberty and safety of the citizens. Rules, maxims, and principles, established to-day, would be contradicted, and overturned to-morrow. One decision would be no precedent for another; nor would the next court feel themselves under any obligation to conform to the judgment of the former.— Law would be vague and uncertain, depending merely on the variable and occasional feelings and sentiments of a court never uniform, but always changing. There would be no certain rule of conduct, demeanor, or possession. Life and property would be precarious. No



*Dec. Sess.* man would know when he was safe ; a man might be  
*1796.* hanged to-day, for that, for which he was praised yester-  
day ; and the sword of Damocles, suspended by a single  
hair, would hang over the head of every citizen.

But, in cases submitted to the examination of the judiciary, there are often two questions involved ; what is true, and what is right ; or, in other words, fact and law. In ascertaining facts, there is not the same reason for uniformity or permanency, as in ascertaining law. One man is neither bound, nor supposed, to act, as another has done ; the same conduct is not presumed in all ; — though the same rule must, in all, be applied to the same conduct. Law must be uniform ; but facts may vary. On the principle of distribution of power, that authorities may mutually check each other, the decision of law, and of fact, is committed to different hands. An uniform rule of right is established by vesting the judges, or courts, a permanent body, with the determination of law ; and an impartial investigation is expected, from vesting in juries, occasionally and fairly selected, the determination of fact. If either courts had the power of ascertaining facts, or juries the power of declaring law, there would be no controul on either. One man might fall a sacrifice to the partiality or malignity of a judge, and another, to the passion or prejudice of a jury. But when a settled rule of determination is established, for all cases, by a court ; and an unbiassed investigation of each particular case secured by a jury ; a permanency of right and enjoyment is accomplished, by this distinct authority over law and fact ; and the citizen may then truly say, that he is free, under a government of laws, and not of the passions of men. But this liberty only lasts, while this distinction is preserved. For, if ever courts take upon them to ascertain facts ; or juries take upon them to declare law ; the constitutional controul over each other is broken down : courts might determine, without truth ; and juries, without law. Liberty would be destroyed, for all certain rule of conduct would be destroyed ; and the property, reputation, or life, of any man might be sacrificed to passion or caprice. The excellency of our judiciary is not merely that juries have a share in the administration of justice ; but that its administration is not wholly in one body of men ; and

that a distinction of authorities, well marked and limiting the power of each, subsists in the judiciary. And it would be found, at least, not less dangerous to the liberty and safety of the citizens, if juries were to usurp a power to determine law, than if courts were to usurp a power to determine fact. We have less obligation on juries, than on courts. Juries consist of many, deliberate in private, and deliver a joint opinion; and, though they might be ashamed to contradict fact, might cover their malice or favour, under a pretence of opinion or error in law, which it is not expected, they should fully understand. They are selected but for an occasion, and cannot be so open to public opinion, nor feel such regard to public judgment, as courts, a permanent body, possessing an office supposed valuable, and exposed to shame, if publicly they lay down one rule of law, in one case, to day, and another, in a similar case, to-morrow. The principles of our judiciary system, therefore, prescribe, that the determination of law should be made by the court, and the determination of fact, by the jury. Thus an impartial investigation of facts, and a skilful and uniform decision of law, are established, not merely in one court, but in every county or district. And we may challenge the world for a purer, more perfect, and more general administration of justice: an important security of our rights, and a distinguished specimen of the excellence of our government!

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But it is not sufficient to form a good system; practical securities must be adopted for its due administration. Interest (I repeat the observation) must be combined with duty: all temptations to error and misconduct must be removed; and motives to rectitude multiplied. The judges must be made altogether independent of the people, and of the other branches of administration. In England, while the judges held their places at the pleasure of the king, they were mere machines in his hands, and were displaced, or continued in office, as they gave their judgments contrary or according to his will. A judge seems to have been displaced for an opinion, against the king's will, on a question, whether a soldier should be hanged in Middlesex or at Plymouth.\* Such

\* See 3 *Mod.* 124—5.

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dependence, in fact, annihilates the judiciary, and vests its powers in the executive. Dependence destroys energy and authority ; and a dependent judiciary is no judiciary. To preserve liberty, and the balance of authority, the judges must be independent of the executive, of the legislative, and of the elective branch or of the people ; by having duration of office and salary secured to them. Since this has been done in England, however corrupt may be the other branches of the government, no country can boast of a purer or more enlightened administration of justice. The same principles have been recognised and established in America, and happily with the same success,

It is fashionable with some, who are perhaps least qualified for a right judgment on the subject, to complain of the expence of the executive and judiciary.— Every citizen, who is called to devote a peculiar portion of his time to public service, has a right to expect such a compensation from the public, as he would receive for like services from an individual ; and in few cases indeed, if in any, has the public compensation exceeded this estimate, but it generally comes short of it. We find, that more is given by individuals, whose object is gain, for similar or less important services, than by the public, whose object is a due administration of the government ; and that there is hardly any man in the executive or judiciary, of talents competent to the duties of his station, who would not increase his gain, by devoting those talents to the service of individuals or of himself. If public offices are so extremely profitable, how comes it, that they are so frequently abandoned, and that we find men of talents generally shun them ? There is not, I believe, a great office in the United States, which has not been resigned, and has not been refused. Will we then complain of want of œconomy ? And would we drive every man of talents from public stations ? A public officer is but an annuitant ; he cannot transmit his appointment to his posterity ; and he has but a few years in which he can make provision for a family, which may be left helpless by his death. If offices are made valuable, the obligations to duty are strengthened by the fear of losing them. If Offices are not valuable, officers may be remiss in their duty, and disregard all threats of removal.



4. Though this review of the principles of our legislative, executive, and judiciary constitution, discovers a perfect security of liberty ; yet, however excellent be those principles, their utility in practice must depend on the distribution and administration of the elective authority. This branch of government is exercised partly and chiefly by the people, partly by the executive, and partly by the legislature. The people choose the members of the general assembly, and of the house of representatives in congress ; they choose a governor, and electors of a president and vice-president of the United States ; and they choose sheriffs, who select juries. The assembly chooses senators in congress. The supreme executive chooses the judiciary, and other executive officers. In this elective branch of the government, it appears, the people have reserved to them as much share, as may safely consist with a judicious exercise of it ; and by their immediate appointment of those who make laws, and by the independent and energetic declaration and execution of them, a government of laws and liberty is secured. The elective power of the people so controuls each of the other branches, and so pervades the whole government, that it is impossible, that liberty should be in danger, or administration be wrong, if the people exercise their elective power with judgment and integrity. The other branches of the government cannot be wrong, if the elective be right. If the people prudently and honestly administer their share of the government, there will be a prudent and honest administration. But corruption in them will corrupt the whole. And, unfortunately we have reason to fear, that, of all the parts of administration, that is the most corruptly or imprudently exercised, which is in the hands of the people themselves ; nor do we see any other public officer, who seems to care so little about the faithful and proper discharge of his trust, as the citizen elector on the day of election. This is not flattery : I wish I could say, it is not truth.

It will be observed, that I have here considered the elective authority as a distinct branch of the government ; and I consider the citizens, while exercising this authority, as public officers, acting in the administration of the government. In this elective capacity, it seems

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not so proper to say, that the people are sovereign, as that they exercise a part of the sovereignty, or that their power is arbitrary, as that it is judicial, with sound discretion and moral liberty. This idea may appear novel. I think it just; and should be disposed to carry it to its full extent. I would call election a public office, and the citizens, in this capacity, public officers, though not ministerial, accountable, like judicial and discretionary officers, for neglect, corruption, or wilfully wrong exercise of their trust. And I am inclined to think, that every citizen elector, might, by law, be compelled, as to any other duty, if he have no reasonable excuse, to attend and vote at elections, and be punished for voting corruptly, or wilfully wrong.

In tracing the causes conducing to an indiscrete or perverse exercise of the elective power, a principal one will appear in the concealment of the conduct of voters, and in the little interest, which they take in the administration of government. Each considers his vote of but small consequence, in comparison to the whole; knows he will not be called to account for the abuse of it; thinks but a very slender part of the evil of his choice will fall on him; and is, therefore, content to intrust the most important affairs of the nation to the management of men, with whom he would not intrust the least portion of his private interest.

Another cause of error in election is the incapacity of many of the electors, from ignorance, and inexperience, to form a just opinion, on important and complex national affairs; so that even when they are disposed to choose honestly, they cannot choose wisely, and many mistake the dictates of vanity and presumption, for the rules of good sense, and the maxims of experience. To every friend of a representative democracy, it is a mortifying observation, that boys, blockheads, and ruffians, are often listened to, in preference to men of integrity, skill, and understanding. This can only be corrected by the extension of knowledge, and a decent respect for wisdom and experience.

But the great source of error in the people arises from those parties, divisions, and distinctions, which our weakness or wickedness excite among us, and which factious, disappointed, and intriguing men lay hold of, to promote

their base and malignant views, and raise themselves to consequence. For this end, they give names to each other, and to those names annex ideas of the most odious nature, that they can devise and render probable. Imputation amounts to guilt; impudent and open assertions gain credit, and men of the best dispositions, and honest concern for the public good, are made to hate each other as fiends, and as foes to the principles and prosperity of our government.

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In the French revolution, those who favoured it, were called democrats; and those, who favoured the old government, were called aristocrats. In America, where there is no revolution; where the principles of our government are as democratic, as a representative government, with any chance of stability and usefulness, can be; where I see no man, who endeavors, or wishes, to alter any of those principles; where there is no privileged class of men, but all alike subject to law, and alike susceptible of office; where there is no kind of similarity between our situation and that of France, nor any thing whatever to justify their introduction; we have introduced the same names. In proportion as a man is ignorant and weak, the words *democrat* and *aristocrat* are familiar to him: and, like fools, who see ghosts, we alarm ourselves with phantoms of our own creation. Our government is a government of liberty, and all friends to it are friends to liberty; and those men are alike enemies to our government and our happiness, who sow dissensions among us, and propagate suspicions of the views and tendency of its administration. Where is the branch or officer of government among us, that can have any interest in lessening the liberty of the people? Must not every public officer soon become a citizen, or leave his children in that condition? Will he forge chains for himself and his posterity? The idea is unnatural and absurd. There is no reason for these suspicions and ill opinions of one another, and of public measures. But there is a manifest reason for every malignant, factious, discontented, and ambitious man, to propagate and support them. How can men without virtue or talents rise into consequence, but by slander, falsehood, and dissention; by representing the state of things, and the conduct of government as erroneous and



*Dec. Seff.* destructive, making professions of piety and patriotism,  
 1796. and promoting any change in which their condition may  
 be improved ?

When Absalom conspired to dethrone his father, he prepared the way for his treason, and stole the hearts of the people, by dissembled courtesy, humility, and concern for justice, and by malicious misrepresentation of David's government.\*

When in the height of the glory and prosperity of the Roman republic, the impious, profligate, and detestable Cataline conspired to involve Rome in plunder, massacre, and destruction, he procured accomplices in his horrid plot, by impudent and hypocritical pretences of virtue, benevolence, and patriotism, by invectives against the corruptions of government, and lamentations on the deplorable state of the nation, the oppression of the rich, and the misery of the poor.†

When Isabella, queen of Edward II. landed in England to dethrone her husband, an innocent, inoffensive, easy man ; she had with her the prince her son, the Earl of Kent, and her paramour Mortimer, the great mover of this enterprise, with two thousand seven hundred and fifty seven men at arms ; "a small force," says Dr. Henry, "to invade so great a kingdom, and dethrone so great a king. But they brought with them a whole army of political lies, which did incredible execution, rendered the unhappy Edward odious and contemptible in the eyes of his subjects, and made the deluded people look on the perfidious Isabel and the profligate Mortimer, as the most illustrious patriots, and deliverers of their country." To cover the guilt and promote the success of her conspiracy, the queen declared, "that the sole design of her expedition was to ease the people of their burdens, to reform the disorders of the government, and improve the liberties of the church." By these arts, "the people of England were wrought up into the most violent rage against the weak and misguided Edward, as a cruel and inexorable tyrant ; and into the highest admiration of the queen and Mortimer, as angels sent from Heaven for their deliverance. But, when the true character and criminal union of this licen-

\* 2 Sam. 15.

† Sallust.

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tious pair came to be better known, the people began to open their eyes, to see that they had been deluded, and to pity the sufferings of their wretched sovereign." The shameless queen and Mortimer, seizing the fruits of their ambition, cast off the veil with which they had covered it, usurped the whole power, and engrossed the whole treasure of the kingdom, inhumanly butchered the deposed king, and impudently trampled on the rights of the insulted people.\*

Cromwell, a fanatic, hypocrite, and tyrant, established his military despotism in England, under the pretence of introducing a republic and the kingdom of the saints. With the most aspiring ambition, he made the basest professions of humility, affected to accept sovereign power as a burden, and that he might exert the duty of a constable; and he mocked God, that he might deceive men. He subdued the civil government, by persuading the army, that the government was hostile to it. And he ruled the army, by setting one officer and party in it, against another.†

Robespierre raised himself on the ruins of the most zealous patrons of French liberty, by successively denouncing every man and party, whose virtues and talents he feared, as aristocrats, royalists, and favourers of tyranny; till he made France a general slaughter-house, and left of liberty nothing but a name. Under the mask of democracy and patriotism, he steeled the hearts, and debauched the principles and morals of the nation; and fell himself under that inflexible spirit of destruction, which he had excited..

Such is the spirit, and such are the arts of base, factious, and wicked men. And let us constantly beware of those, who, making great professions of patriotism and virtue themselves, denounce censures against the character and conduct of others, and against the principles and measures of our government. Especially guard against such arts, when they are exerted at the time of an election. The man who endeavours to mislead the judgment, impose on the credulity, and so pervert the choice, of the citizens, in their elections of public

\* *Henry B. 4, c. 1, § 3, 4. Hume, c. 14, 15.*

† *Hume, c. 61.*

*Dec. Sess.* officers, poisons the source of our government, and corrupts the whole mass of the administration. To me this appears a crime of the first enormity, and deserving the most cordial detestation. It is an offence against civil duty, indictable and punishable.

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We had a remarkable specimen of this on a late occasion. Previous to the election of electors of president and vice-president of the United States, hand-bills, some of which are said to have been fabricated in Philadelphia, and some in Washington, were circulated, with malicious industry all over this country; stuffed with a turgid and foolish rant of liberty and aristocracy, and with base and pitiful misrepresentations of the sentiments, and false and slanderous invectives against the principles, of one of the earliest, firmest, most enlightened, uniform, and irreproachable patriots of America. When a man proposed as a candidate, for an important public station, is thus libelled, misrepresented, and abused, the injury is done to the people, rather than to him. The people are abused in their information, perverted in their judgment, and cheated of their choice; and it becomes every honest citizen, to unite in resentment against the authors and promoters of the delusion, and the hand of justice to bring them to punishment.

When we consider from what small beginnings great mischiefs have arisen, and how important it is, that all claims of right should, in civil society, be determined by an impartial and unprejudiced tribunal; we shall perhaps see reason to watch, if not to censure, an association of certain *actual settlers* on Beaver creek in this county,\* published in the Pittsburgh gazette of 10th September last. These, under a kind of corporate name of the *united settlers*, have agreed each to contribute a sum of money to defend any law-suit, which may be brought to dispossess any of them of the land on which he has settled, and, under the penalty of three thousand dollars, to make no agreement or compromise, on any such law-suit, without the consent of a select committee.

On strict legal principles, since there is no common interest in the land, since the title of one is not the title

\* This and the following paragraph were delivered in Allegheny county only.



of another, nor derived from it, nor affected by it, and since, therefore, the decision of one of their cases cannot govern or affect that of another; this seems to approach or amount to *maintenance*, which consists in an officious or unlawful intermeddling in the suit of another, by maintaining or assisting him with money or influence to prosecute or defend it; and is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law.\* But I look more to the peculiar probable consequences of this case. We have judges to decide law; we have juries to decide facts. Is there any corruption or delay in our courts, to require or justify an association to obtain justice? Since juries are part of the tribunal, by which these claims are to be determined, and juries must be selected from the people of the county; is there no danger to the impartiality and integrity of decision from a numerous combination of the people of the county?—And may we not apprehend, when their claims are thus fortified by mutual confidence, and bolstered up by extrajudicial arguments and opinions, that a legal decision may be doubted, denied, and resisted; that law may, as we have seen it, sink under popular delusion and violence, and a new Wyoming be established among us. Our government is free; our administration of justice is intelligent, impartial, and unspotted by suspicion.—Let all claims, therefore, be quietly and fairly submitted to the decision of the law.

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\* 4 Comm. 134.

## No. XX.

*Causes and Error of Complaints and Jealousy of the Administration of the Government.*

**W**HEN we examine the principles of our constitution, we have reason to admire it, as an excellent form of a free government. And when we consider its binding force and acknowledged authority over all the branches of the administration, we have

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*March Sess.* reason to confide in it, as a security of liberty. That  
 1797. either the constitution or its administration should be perfect, it is inconsistent with the nature of man, its agent and object, to expect. Can the work of man resemble that of angels; or would the laws of angels controul the vice and folly of man? We are yet on earth, and not in heaven; the imperfection of our nature must show itself in all our works, and in all our conduct; and to the imperfection and perverseness of our nature, must our laws be adapted. The variety of the human mind renders impossible an uniformity of opinion: as well may we expect uniform serenity of sky, or constancy of health. The genius of our government, dictating a just regard to the sentiments, of every individual, contributes, with the variety of our nature, to render vain the hope of general approbation. Where the iron yoke of despotism weighs down every neck to an equality of submission, opinion is useless, and complaint dangerous: and there is the acquiescence of constraint, and the silence of fear. But in a democratic government, where each man, while he feels his consequence, must feel his disappointment; you may as well bid the water cease to ruffle, when the wind blows, as think to prevent dissatisfaction, suppress murmurs, or still clamour. These arise out of our nature, and our government; and, like other evils, may be lessened by prudence and skill, but cannot be removed.

To have been in a situation of difficulty and danger, and to be extricated without injury, loss, or cause of regret, is more than human nature, or human fortune will permit us to hope. To have adjusted the sufferings, services, and debts of a revolution, and an eight years war; to have prepared, on a new and untried plan, and to have created interests to support, a frame of government for thirteen extended and independent states, of various prejudices and views; to have administered the government of those states, under all the errors of its structure, and the perils of their condition; to have reformed this government, and adapted it to their varying circumstances; and, hitherto, disappointing the malicious hopes of our enemies, and the affectionate fears of our friends, to have conducted it prosperously, amidst the conflict of a world in arms; is a task, which only

the ignorant and thoughtless will deem light. And to have executed this task without many errors, and many complaints, would have required a wisdom, a virtue, and a fortune, far above the lot of man. When we view our past steps, our present state, and our future fair and reasonable prospects; every candid and intelligent man, who justly estimates the difficulty of our affairs, and the frailty of our nature, will see abundant reason to respect the wisdom and virtue of those, by whom our government has been administered, and to admire the felicity of our fortune.

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As we ought not to hope, in man, for the virtue of angels, neither ought we to fear, in him, the malice of devils. A weak and erring creature, he is sometimes misled by ignorance, and seduced by temptation; but when he wilfully does wrong, it is for some cause, other than the pleasure of doing it. The way to keep man right, therefore, is to point out clearly his duty, and remove from him all inducement to depart from it. The man, who, in this situation, does wrong, must have a degree of malignity not common in human nature; and the man who can easily suppose it in another, must feel something in himself inclining him to do it. In this situation our constitution, as nearly as practical skill and prudence can direct, has placed all those who are intrusted with its administration. The limits of authority are prescribed, and temptations to abuse of authority are, as much as possible, removed. No man can make laws to bind others, and not himself. No man can judge in his own cause. The authority of every man may be examined, and every man's abuse of it punished. All duty is defined; all power is limited; all interests are the same. There is no power, but, in some way, is derived from the whole community, and, in due progress, returns to it. There is no power, which abuse of it does not determine. There is no privilege, office, or trust, which is not accessible to the merit of any citizen, none which his merit can transmit to his posterity.—There are no offices, trusts, or pensions, but for the public benefit; none, which the public will cannot abolish. What more effectual guards, than our constitution has established against temptation to human



*March Sess.* frailty, could human prudence invent. That those who  
 1797. have administered the government *have* erred, may be true; and that they *may* err, is true; for they are men. But, as the constitution has, as much as possible, removed temptation, we cannot, without proof, or without admitting our own corruption, suffer ourselves to believe, that they have erred wilfully.

Besides that security of liberty, and a faithful administration, which the principles of our constitution, and the nature of man afford us, we have an additional security, in the *station* of those who are intrusted with the administration of our government. If the elective branch exercise its powers with judgment and fidelity, it is hardly possible that the administration should be wrong; for it will fill all offices with men of understanding, integrity, and knowledge: and such appointments must produce a good administration. Considering therefore (as, where the elective branch acts properly, we ought to consider) that appointment to office is an evidence of understanding and knowledge; we have, in station, a security for a faithful administration. There is, in understanding and knowledge, a power, which those who possess them not cannot feel, almost irresistibly impelling to acquire reputation, by a faithful discharge of duty.—Understanding and knowledge furnish a just estimate of the importance of virtue, and inspire the mind with a desire of it: and, however they may sometimes yield to strong temptation, it requires far stronger temptations to baffle the judgment, where they exist, than where they exist not. Let, therefore, the elective branch always fill offices with understanding and knowledge, as most justly and readily valuing and embracing duty.

Together with the constitution, nature and station, we have, in that *character*, which station enables public officers to form, a further security of a good administration. Is it to be supposed, that understanding and knowledge, which so strongly impel to pursue virtue and duty, will not as strongly impel to retain them? Character, reputation, or a good name, is not easily acquired, and will not less reluctantly be abandoned. It is not in the nature of man readily to give up that which we have hardly acquired, and highly value. Is it easy to conceive, that a Washington or an Adams, who have

derived all their fame from their exertions in the cause of liberty, would abandon the source of their glory and their pride? *March Sess.*  
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We find, therefore, in the nature of man, in our political constitution, and in the station and character of those who administer it, a competent security of our liberty, and a faithful administration. And I am persuaded, that an accurate review of all the past transactions of our government will satisfy every intelligent and candid mind, that they are all consistent with a sincere desire for the public good, and generally well calculated to promote it; that the errors in it have been fewer, than in other governments in similar circumstances, and that, to account for those errors, it is not necessary to suspect corruption or any design against liberty; for they may all be accounted for, by the fallibility of human judgment, and the variety of human opinion.

But why then, if our government has been so administered, and we cannot hope for perfection, do we hear complaints? Complaint is as natural to man, as error. False judgment is one of the natural errors of man.— And we are not less disposed to censure others, than to approve ourselves. Let any man look back on his past life, and, with his own compare the opinion of others on his conduct; and then say, whether others form a right judgment of his motives and actions. If others be mistaken, with respect to us, may not we be mistaken, with respect to others? And may we not all be mistaken, in the judgment we form of the administration of the government?

The administration, indeed, may have been erroneous; but, without supposing error in the administration, we may account for complaint, from the nature of man, and of our government. Where the powers of government are limited to a few, they are supposed to qualify themselves for the administration of them; and others, who have no authority, may take no pains to examine or to judge, but submit in silence. But, in our government, every citizen has a share in the administration, and a right to examine its conduct. We are too apt to confound right with capacity, and power with skill;—to think ourselves qualified to do, what we are permitted

*March 8<sup>th</sup> 1797.* to do ; and, because we *may* judge, to suppose that we *can* judge. Politics, legislation, or the art of government, is a science, and, like other sciences, to understand it, requires knowledge, study, and reflection. Respectable as this country is, we can hardly suppose, that the state of education and knowledge in it is yet such, as to enable all who *may* judge, to judge *rightly*, of the conduct of administration. And this difficulty is increased by the readiness, with which our interest directs us to admit strangers to a participation of our privileges. We sometimes see those, who, but a few months from Europe, and but ill qualified by previous knowledge or experience, have had little opportunity of understanding our interests, suddenly, and even before they have acquired the character of citizens, become the most forward to examine, and the most severe to censure, the measures of our administration. The difficulty, therefore, of general knowledge, will induce a prudent man, when he hears complaints of administration, to hesitate in deciding, whether the error be in the administration, or in the complaint ; and to consider on which side there is the best chance for a right understanding of the subject.

In the mechanic arts, a stranger will frequently be at a loss to explain the use, and frequently be disposed to censure the folly, of the different operations of the artisan. But this happens more rarely in the common arts, because the effect is so immediately connected with the operation, that we can more readily discern its use, and form a right judgment. In the sciences, physic, law, &c. where our ignorance is greater, and can be less easily corrected, our mistakes are more frequent, and more gross. Under no government, perhaps, has justice been more purely and skilfully administered, than in courts of law in our government. Yet do we not sometimes hear their decisions arraigned, by the ignorant, as erroneous, and, by the malevolent, as corrupt and prejudiced ?

We admit, that all nature is under the government of Almighty wisdom and goodness : but is there any government, against which there are so many complaints ? Where is the man that could not prescribe better seasons, better health, and better fortune, than we now receive from the Great Governor of the universe ? If



we are not pleased with the government of God, can we wonder, if the government of man displease us? And in whom shall we say is the error? March Sess. 1797.

Since we complain most, where we least understand, we have reason to lay it down as a rule, that, where, as in our government, there is little temptation to error, complaints are in proportion to ignorance, and arise from it.

As our ignorance occasions complaints, our information is often ill qualified either to justify or remove them. Our most distinguished *clamourers* frequently derive their information only from newspapers. I would not be understood to throw out indiscriminate censure; but newspapers are sometimes published, not that they may be useful to the readers, but to the printers; not that they may instruct, but that they may be bought; and the object of the publishers is not so much to inform the judgment by just knowledge, as to excite passion and curiosity, and support the party that will best support their custom.

Sometimes also we see men, who, disappointed by accident, or destitute of useful talents to lead them to that rank or character, which their vanity or ambition suggests, seek popularity by censure and complaint against all measures. Unable to comprehend, they seem to dread, every proposition which comes not from themselves, and fill the country with their false clamours and foolish fears.

When we combine all those causes, we may, without admitting that the administration of our government has been erroneous, perhaps justly, wonder, not that the complaints have been so many, but that they have been so few.

Besides these internal grounds of dissatisfaction, there is another, from which some nations have suffered much; but from which, I hope we have little to fear. The author of *A History of the late Revolution in Sweden*, says "The framers of the Swedish constitution, by placing their liberties beyond the reach of any attacks of their sovereigns, imagined they had effectually secured them; and forgot they had left a door open for another species of corruption, equally fatal to liberty, and, in its conse-

*March Seff.* quences, infinitely more ruinous to the country, foreign  
 1797. corruption."\* To this cause, tampering with the inter-  
 ————— rests and feelings of the people; embarrassing the coun-  
 sels, and checking the energy of the government; and  
 thus throwing the nation into confusion and distress, he  
 attributes that revolution, which restored the king to  
 despotism, and overthrew all those barriers of liberty,  
 which the framers of the constitution had established as  
 effectual.

We, distant from the courts of Europe, and inexperienced in their intrigues, can have but little knowledge or suspicion of the artifices, by which the greater play off the smaller states against each other. Under pretence of maintaining the peace of Europe, they are in a constant state of concealed hostility; and, to preserve the balance of power, each kingdom is perpetually on the watch for an opportunity of aggrandizing itself. Of those European powers, France and Britain have long taken the lead; and, with all the influence which money and art can give, have mutually striven to make every smaller state a thorn in the side of each other, and light up the flame of war, whenever their several interests might suggest. For this purpose, they have maintained ministers at every court in Europe, to watch the conduct of that court, and the ministers of other nations there. But, as those public agents must be known and suspected, and so less competent for the necessary corruption and artifice; they have often been but shadows, without real confidence or power, and have been directed to receive instructions from others, who had no public authority. Or, if they acted uncontrouled, together with them, there were often sent others, who possessing talents without a name, and exciting no suspicion, could intrigue more successfully. To those public ministers and concealed agents of the courts of France and Britain, was intrusted a competent management of powers and money. They interfered in all the internal measures of the state in which they resided. They excited parties, where they found none; and, where they found parties, they supported them. In these intrigues, principle was alto-

\* *Sheridan's History of the Revolution in Sweden, Part II. Sect. 2.*

gether disregarded; except the principle of embroiling the government on which they acted, and accomplishing the purpose they meant to effect. While, at one time, in Holland, the agents of France supported democratic or aristocratic factions, because the agents of Britain supported despotic; in Sweden, they changed sides; and each supported that in one country, which it opposed in another. And, in the same country, at different times, they adopted a contrary conduct, as their interest or views suggested. In Holland, or in Sweden, the minister of France was, at one time, on the side of democracy, and, another time, on the side of monarchy, as he could best wield the foreign state to the purposes of his court. And the minister of Britain as certainly took the side opposite to that which the French minister headed. To secure his success, each minister distributed money, fomented prejudice, and stirred passion, through the whole state: and the parties of the distracted nation, deluded by their arts, or seduced by their wealth, believed or pretended, that they were struggling for the interests of their country, when they were contributing to its ruin. By spies and bribes, those foreign ministers pried into all the counsels of the state, which they were sent to watch or corrupt. They endeavoured to influence all its conduct. If a treaty were ever so necessary and inoffensive, they affected dissatisfaction, feigned injury, embarrassed its progress and execution, and excited clamour against it. If an election approached, they spread abroad reports, and exerted influence, bribes, and corruption, to secure the appointment that most favoured their views. The author whom I quoted, informs us, that, when the states of Sweden assembled in 1765, the French ambassador was supposed to have laid out no less than 400,000 *livres*, in the election of the marshal of the diet. But the English and Russian ministers had taken their measures so well, that the marshal was of their side. What then must they have laid out!

He also informs us, that, in 1766, Sweden concluded a treaty of friendship with England; the chief article of which was, that the subjects of each nation were to enjoy reciprocally, in their respective kingdoms, ports, and harbours, all advantages and immunities which the most favoured nation did then, or might afterwards en-

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March *Seff.* joy. "Inoffensive," says he, "as this treaty was, France affected to be exceedingly dissatisfied with it, as well as surprised at its being concluded without having been previously communicated to her. She accordingly made use of it, as a pretext for putting off the payment of a part of the subsidies, which had been then sometime due. She further threatened, that, in case Sweden entered into a defensive alliance with England, she would deprive the Swedish ships of all the advantages they possessed in the ports of France. There is something in the French ambassador's declaration to the Swedish ministry on this occasion, which gives so true an idea of the dependence in which Sweden was held by France, that it deserves a place here. *The true reason of the delay of the payment of the subsidies is, that his most Christian Majesty had made, in consequence of treaties which he religiously observed, certain political arrangements relative to his interior affairs: that one of these arrangements of his majesty, with regard to the North, was that Sweden should conclude no treaty, without his majesty's consent. That, in contempt of this engagement, the motive of the subsidies of France to the Swedish court, Sweden had made a treaty with a foreign power, without waiting for the consent of his most Christian Majesty. That Sweden, not attending to this engagement, had deranged the political views of his majesty, as his non-payment of the subsidies would derange the economical views of Sweden.\**

Poland has long exhibited a melancholy example of the fatal effects of foreign influence on a divided people, and the deplorable spectacle of a nation broken to pieces by its own passions, and the violence of other powers.—The king of Prussia, in his memoirs from 1763 to 1775, has detailed (and he knew them well) some of the intrigues of foreign states, and the miserable pretexts under which they cover their ambition, rapacity, and hatred towards the unhappy nations, whom they embrace in their cruel and insidious policy.

Mirabeau, the distinguished defender of French liberty, resided, some time before the revolution, as secret agent of France in Prussia. Of the means, which such persons use, we may form some idea from his expressions.

\* *Hist. of Rev. in Swed. part II. Sec. 3.*

"I do not scruple," says he, "to affirm, that, by the aid *March Sess.* of a thousand guineas, the whole secrets of Berlin might *1797.* be perfectly known—It is impossible, that any thing should escape the ambassador of France, if he be adroit, active, liberal, and has the art to invite proper guests to his *daily* dinners and suppers: for these are the efficacious means, and not *public* dinners. He is a kind of register office, to which all the discontented, the babblers, and the covetous resort.\*"

Though, as they always opposed each other, one of them might sometimes do good, yet it is not to be supposed, that the arts and money of those foreign ministers, to learn and influence the counsels of the nation in which they resided, even when they promoted the good of that nation, were exerted for that purpose, or for any other purpose, than to promote the views of their own courts. Mirabeau, while at Berlin, seems to have been the agent of Mr. Calonne, then in the French ministry; and is said to have written his letters to Taylyrand Perigord, late bishop of Autun. Speaking of the disturbances in Holland, he says, "The undoubted politics of our cabinet, are to render the stadtholder subservient to the public good, and the independence of the United Provinces; not to procure his expulsion. A successful pacification of the troubles of Holland would render Mr. Calonne more service, than their continuation.—Should it be proved to Mr. Calonne, that the stadtholder is come over to the side of France, wherefore will he spoil his own game.†"

If we examine the history of the minor states of Europe, we shall find, that the agents of those two nations, Britain and France, in opposition to each other, have been constantly engaged in endeavours to turn the counsels and exertions of every other state, at whatever expence to itself, against the rival nation. Though war of the sword may have ceased, war of arts and intrigue never ceased between them. And though, to succeed, they might cover their intrigues under the specious pretence of the interest of the state which they strove to influence or aid, their real design was always the ag-

\* *Anecdotes of the court of Berlin letter, 64, 46.*

† *Ib. Let. 62, 61.*

*March Sess.* grandizement of their own, and the humbling of its rival nation.

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With this disposition, it was not to be supposed, that, when the American revolution commenced, France would be indifferent to so fair an opportunity of humbling the pride and power of Britain. Accordingly, as soon as it was seen to be no hasty riot or transient insurrection, that would sink under the force of the British government; but was likely to issue in the complete independence of the United States, the French court took a decided, open, active, and useful part in our favour. The resentment arising from the war, and the disputes arising out of the treaty of peace, left no inducement for France to increase our animosity against Britain. But no sooner did we endeavour to compose those disputes, by a treaty, necessary for us, and harmless to France, than here, as in other countries, France clamoured against that treaty; because it restored us to a state of amity with Britain.

I have no desire to lessen that just resentment against the actual and intended injuries of Britain, or that just gratitude for the services of France, which every American has felt. Nor am I satisfied, that the opinion is altogether correct, that a nation ought to have no passions. Resentment and gratitude are useful passions, planted in man for good purposes. Resentment of injury ought not to cease, while redress is attainable, and not obtained. Nor ought gratitude for benefits to cease, while retribution is practicable, useful, and not bestowed. If Britain be no longer our enemy, but now disposed to do us justice, ought not our resentment to cease? If our services would be useless to France; if fighting no longer for her safety, but for her pride, she ought not to claim them; and if, while they could only feed her *pride*, they would hazard our safety; ought gratitude to be exerted? It is no longer a question whether the nations of Europe will acknowledge France as a republic. The combined armies no longer take her towns, or occupy her territory. Instead of defending her own, she now overruns other countries; and continues the war to enlarge her own boundaries. Britain, her most dangerous enemy, has already sent to her capital, to sue for peace. And France may, whenever she pleases, have the con-



sent of all her enemies, to sheathe her sword, disband her armies, and, under her republican constitution, retain all that vast empire, which her king governed. In this situation of France, and when we have omitted no service, which, without injustice or ruin to ourselves, we could bestow; shall our gratitude be summoned to services useless to her, and dangerous to us? And shall it be called ingratitude, without war, to have composed our disputes with Britain, by a treaty, which has secured to us points essential to our safety, and contains no stipulation injurious to France? Though gratitude be a duty, both of states and individuals; the first duty, both of states and individuals, is self-preservation. States, like individuals, may often cover their conduct with pretences of generosity and disinterestedness; but it will be found generally, that *self* is at the bottom. Nor do we, but in romance, see Don Quixotes, who gratuitously labour through the world, to redress grievances. Among nations, as among individuals, where there is no common interest, there will be but little common service. And, in both, a prudent man will always suspect strained professions of generosity, for symptoms of deceit.

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To a prudent jealousy of other governments we ought to unite a prudent confidence in our own. Here the tie of common interest subsists. With a constitution restraining all the branches of the administration, and with frequent elections, what have we to fear from our government? Where there is no room for fear, there is no cause for jealousy; and confidence becomes a duty, which we owe to our own happiness and interest. A decisive, firm, and energetic execution of the laws, is the health of a free government; and, to secure that, the hands of government must be strengthened, by a just confidence. Where there is an influential representation of the people, violations of the constitution are, at least, not less to be feared from the legislature, than from the executive. The most popular branch is always the greatest favourite; and favourites are always the most apt to abuse power. The senate of Sweden determined, that they might supply the want of the king's signature, by affixing a stamp of his name; in other words, that, though he governed in form, they should govern in re-

*March Sess.* ality. The house of commons in England raised troops, 1797. in the king's name, to fight against him ; and, as soon as they found, that they could govern without him, they laid him aside, and, after him, dismissed also the house of lords, and took all government into their own hands.

But have not other nations lost their freedom, by usurpation of the executive ?

Precedent or example becomes argument, only when cases are similar : and a variety of circumstances contributed to despotism in Europe, which do not exist here. There, the king was considered as owner of the whole territory ; and all estates were derived from him. He had a separate estate annexed to his person, extensive domains, and large revenue. All estates, that had no heirs, escheated to him. All, that were forfeited for crimes vested in him. All penalties and forfeitures for offences were his. For the use of all these, he was not accountable. He commanded the whole force of the kingdom. He could raise and maintain armies of his own will, and direct them at his pleasure. The administration of this revenue, and command of this force, combined with the turbulence and rivalry of feudal aristocracy, enabled the king to increase his authority at his discretion. This accumulation of estate, treasure, force, and authority, enabled the father to transmit his possessions and authorities to his son, and made the crown hereditary ; and this both tempted and enabled to render it despotic. While all were accountable to the king ; his ministers only were responsible for the acts of administration, and he was subject to no jurisdiction. The situation of our executive is so entirely different from all this ; that the jealousy, necessary in other governments, is not necessary in ours ; nor does it seem to me proper to believe, that party spirit contributes to the preservation of our liberties.

Let each of us look into his own heart, and charitably believe, that the virtues which he sees in himself, exist also in others. Let us not suppose, that patriotism is confined to ourselves, to our friends, or to our party ; or that other opinions and measures than ours may not also be intended and adapted for the public good. Let us judge of men in public stations, as men ; with the errors indeed, but also with the virtues of men, and ex-

amine their conduct with that indulgence to their weakness, and that respect for their integrity, which we owe to men, and as men expect to receive. Let us instruct, and, if possible, reform, but not hate each other. Having all a common interest in the prosperity of the state, let us, as members of one family, work together in unity and affection, for the public good, and discharge our political duties, with fidelity and judgment. In electing to office, let us be careful to choose men of knowledge, understanding, and integrity; and then, reposing, with confidence, in the excellence of our constitution, and the skill and honesty of the administration; let us not disturb our peace with groundless jealousy, nor weaken the energy of the laws, by rash censures, and erring complaints. And, with this spirit of faithfulness and reciprocal confidence, let us proceed to the peculiar duties of our several stations, at this time.

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## No. XXI.

### *Distribution of the Powers of a Republican Government in subordinate Jurisdictions.*

THAT man cannot be governed without force, is one of those truths, which, as too often learnt only by experience, experience will last abandon. The young mind, unacquainted with the dangerous effects of human passions, cherishes the delusive idea, that all men are virtuous, that they have no selfish views, but listen to the voice of reason, and pursue the general good; that restraints on opinion and passion are unnecessary, and punishments of misconduct, cruel; that, to be free, we must be unrestrained; and that exertions of the power of government are violations of liberty. Sentiments like these are received with the stupid applause of the ignorant, and with the malignant praise of the artfully wicked; and become the watch-words of party and the symbols of faction. The most salutary measures, and the most faithful ministers of government

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*Sept. Seff.* are suspected, misrepresented, censured, and opposed; till  
 1797. falsehood triumphs over truth, passion over reason, popular opinion over public authority, and riot and insurrection over order and peace: the main pillar of government, general confidence, is undermined; and licentiousness destroys liberty.

Nor is it in politics or civil government alone, that these errors exist: every where wisdom will be opposed by folly, knowledge by ignorance, prudence by rashness, and virtue by vice. The most efficacious doctrines, and the most beneficent precepts, of religion, are censured, as unreasonable restraints of human opinion and conduct; the most prudent discipline of the church, as encroachments on freedom of life and manners; and its most enlightened and honest ministers, as enemies to human happiness, ambitious seekers of power to themselves, and tyrants over the consciences of others.

Wisdom and power will never use more means, than are necessary to accomplish the end. If man could have been governed by reason, and a regard to duty, would the Almighty have had recourse to mysterious doctrines of faith, positive precepts of practice, and the most awful and tremendous punishments? For the government of man, even in his most perfect state, it was necessary to add, to the knowledge of duty, the fear of punishment, and denounce death to the transgressor. And human governments but imitate the divine, when they trust not to man's reason and virtue alone, to preserve him in obedience, but, knowing that force is necessary, prepare force, to keep him in peace, submission, and duty. Without force, neither can the useful purposes of government be accomplished, nor the government itself subsist. For (such is the perverse vehemence of human passion) a government, without a ready and constant command of force, will soon fall.

On this ground, we may account for its being received as a maxim, that a republican government is incompetent to an extensive territory.

Though, in a republican government, laws, and not men, govern, and though laws be made by the whole people, yet, the people being numerous, no individual feels an attachment to the laws, as to his own authority. While there is no peculiar affection to the laws in any,

there is, in many, a strong resentment to them. The laws, which are made to restrain and punish offences, must be odious to offenders, and offenders are, in all countries, a numerous class. With them are associated, in sympathy at least, all who, from like propensities, may foresee like danger to themselves, and wish to prepare, in others, a precedent of indulgence to their future frailty. And, even in the most honest, there may, from the want of personal interest and of an enlightened mind, be less indignation for the wounded honour of the laws, than compassion for the sufferings of the offender. While the people thus forget their own honour, the officers, in whose hands is the public force, feel too little interest in the office, and are too much within the reach of the people, to oppose their humour, or excite any individual resentment by a strict execution of the laws. By a faithful exertion of their authority, they are sure to create some enemies, but no man feels himself thereby bound to be their friend. By indulgence to offenders, they are sure to create friends, but no man feels that interest in public authority, as, therefore, to become their enemy. Thus the disposition, both of officers and people, is too often inclined to relax the energy of the laws. Relaxation of the energy of the laws will certainly produce licentiousness; and licentiousness will certainly destroy the government. This will happen, even in a narrow territory. But in an extended territory all the causes will operate with increased force, and proportionally accelerate the crisis of the state. According as they are remote from the seat of government, the vigilance of officers will be lessened, their respect for the energy and dignity of the government diminish, and their motives to indulgence of offences will multiply. Temptations of ambition to set up separate independencies will occur, or be suggested; combinations will be formed, for this purpose, which distance will render it difficult for the general force to restrain and subdue. Thus every thing will conspire to produce a relaxation of the laws; and of consequence, a corruption of manners, licentiousness of practice, and a prostration of morals. In this state of society, no government of laws can stand (for licentiousness and laws can never subsist together), and a government of force must succeed.

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It results from all this, that, to make a republican government permanent, even in a small, but especially in a large, territory, it must be indeed a government of law, and not of the passions, either of the people or the officers. To make it so, it is necessary, not only to provide for the free and enlightened establishment of laws, but also for their instant and energetic execution. To effect an instant and energetic execution of the laws, it is necessary to deposit the public force in hands sufficiently independent of the humours of individuals, and sufficiently interested in the execution of the laws, at all times, to ensure such an application of it, as will compel universal submission. And, in such hands, the powers of government ought to be so distributed into every part of the territory, that it may reach, not only into the house, but, if possible (with reverence I speak it) like the power of the Almighty, into the heart, of every man. If this can be done, a republican government of laws will, with the blessings of liberty, have all the stability and force of despotism; the people will be well governed; for they will be, at the same time, free and submissive; and they will be happy, because they will be compelled to be virtuous.

The force, then, of a republican government consists in universal respect for the laws. While that subsists, the whole people is a standing army, to compel their execution. When that fails, the laws will not be executed, and the government, which exists only in the laws, is then annihilated.

I may be reminded, that the republic of Rome governed a vast territory, and lasted a long time. But let it also be remembered, that it governed by a military despotism, and is no example to any other republic, which does not pursue the same plan.

When the constitution of the United States was under consideration, this objection to a republican government, over an extensive territory, was discussed. It was said, that the objection applied only to a single government over an extensive territory, and not to a federate government, as is that of the United States. And it was stated from Montesquieu,\* that a federate repub-

\* *Spirit of Laws*, B. 9, c. 13.



lic composed of several states, united together under a general government, might preserve itself from external force, the great danger to small states, and from internal dissention, the great danger to large states ; and might become permanent.

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This is the nature of the American governments. Sixteen States, each possessing all power necessary for the regulation of its internal concerns, are combined into one, possessing all power necessary for the regulation of the general concerns : and this scheme, on the principles of Montesquieu, is competent to secure the stability of a republican government over an extensive territory.

Admitting that this scheme is competent for this purpose, still some proportion must be preserved between the extent of the territory and the number of subdivisions ; for a large territory must be subdivided into more states than a small territory, or each may, more or less suffer the evils of an extensive republic. The question, then is, whether each state be not too extensive, for its government to superintend, with efficacy, all its internal concerns ; and whether there ought not to be subdivisions, subordinate to states, descending to a competency to the minutest public concerns, and rising, in a regular gradation, one above another, the larger comprehending the less. The necessity of this seems admitted. For every state is divided into counties, and every county into inferior districts, which, in this state, are called townships. This is the lowest subdivision, and, perhaps, lower than this may not be necessary : except, that, as the same regulations, which are sufficient for a country township, may not also be sufficient for a town ; a town is often declared a separate district, and incorporated, under the name of a borough.\* Thus we have boroughs, townships, counties, states, and the United States ; and our political districts, descending to the smallest limits, that convenience requires, become more extensive, by degrees, and include each other, till the Union includes the whole territory of the United States.

But, while it may be admitted, that a competent government has been established for the United States,

\* *There is but one City in this state.*

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and for this state; and while it may be admitted, that this state is sufficiently subdivided into inferior districts, it may yet remain a proper subject of enquiry, whether a competent government has been provided for the inferior districts, into which this state is subdivided; and whether this is not a subject proper for legislative consideration. And this subject is the more open for discussion, as, if any new provision be proper, no extraordinary convocation of the people, nor any alteration of the constitution, is necessary, to effect it; but it may be accomplished by the ordinary exercise of legislative authority.

It may not however be improper, for a moment, to suspend this enquiry, in order just to mention, that there is another division of the state with a view to elections. Several counties sometimes compose one district, for the purpose of choosing one or more senators in the assembly, or representatives in congress. And now, I believe, every county is subdivided into election districts, each composed of one or more townships, or parts of townships; within the bounds of which all the inhabitants meet at one place, to elect their county, state, or federal officers.

The powers of government are usually divided into three kinds, legislative, judicial, and executive; and I consider it as essential, that, not only the whole territory, but every division or district, into which it is divided, possess, within itself, full authority of the legislative, judicial, and executive kind, under the control, when any of its regulations or acts have a more extensive tendency, of the superior district or jurisdiction, which may be affected by them.

The authority of the government of the United States, extending over the whole territory of our federate republic, is defined in the constitution of the United States. The authority of the government of Pennsylvania, one of the districts or members of the United States, extending over the whole of this district, is defined in the constitution of this state. I do not take upon me to suggest any improvement in the federal or state constitution; but proceed to enquire, whether a competent government has been provided for the counties and townships, into which this state is divided and subdivided.

The United States is a corporation. Each state is a corporation. But it has not been expressly declared, that every county, and every township, is also a corporation. This ought to be done. *Sept. Sess.*  
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The authority resembling the legislative, for the county, is vested chiefly in the county commissioners, who are authorised to impose and apply such sums of money, as are necessary for the public service and benefit of their respective counties.\* This authority seems to be ample; and I think it proper, that the commissioners have complete legislative authority, to direct the internal taxes and improvements of the county. Besides their present authority, they ought also to have power to declare any navigable streams, within their counties, to be public highways; and to prescribe where and how roads shall be made and maintained, at the expence of the county. The manner of their exercising this authority may be regulated by law, and, like other authorities, in all proper cases, submitted to the controul of the judiciary.

The commissioners come into office generally unexperienced in their duty, and, not seldom, with strong prejudices against a right exercise of their authority; and, before they have overcome their prejudices, or learnt their duty, their authority expires. Thus the office of commissioners is too often filled, not with intelligence and public spirit, but with ignorance and obstinacy; and the improvement and prosperity of the counties are greatly obstructed. This might be remedied by doubling the time of their appointment, and electing only once in every two years; or, if this were thought proper, by doubling the number of commissioners, and electing one yearly.

The county judiciary is established by the constitution of the state on a respectable footing. The legislature has not yet, though they have the example of the courts of the United States, for this purpose, vested the state courts with chancery powers. This is an essential improvement yet wanting, and easily to be effected in the judiciary department. I consider it as another



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defect in the county judiciary, that their records may, before judgment, be removed out of the county. All the purposes of uniformity might be effected, by making the supreme court, as to other counties, while it sits in Philadelphia, a court for the decision of points of law only, without any jury process; and by directing, that one or more of the judges of the supreme court, or with the president of the county court, should, at stated terms, and, at least, once in every year, hold a circuit court in each county, for the trial of all cases removed from the county court into this circuit court. Judgments of the county courts might be examined in the circuit court, on writs of error; and judgments of the circuit court in the supreme court, which, composed as is now the high court of errors and appeals, should be the court of last resort in this state.

The executive officers of the judicial authority are sheriffs, coroners, &c.

The commissioners have power to appoint a clerk.—

This is an officer essentially necessary to a proper execution of their trust. Their proceedings ought to be accurately recorded, and their books and papers deposited in a safe public office, under the care of their clerk.

A county treasurer is also appointed by the commissioners, for the receipt of all the county and state money within the county. He also ought to have a safe public office, and keep public books.

For the collection of public taxes, the system of township officers ought to be applied to.

The system of township government, as the least important, has been the least attended to; and it is from the improvement of it, not only as it concerns the several townships, but as part of the general system, that the chief benefit, which I have in view, will arise.

At present, there is no general authority in a township analogous to that of county commissioners. The care of the roads is committed to supervisors, and the care of the poor to overseers. And, for these several purposes, they have, severally, the authority of imposing, applying, collecting, and expending the township taxes.

The judiciary authority is vested in a justice or justices of the peace, acting singly, and in an unsolemn and domestic way.

Constables execute the process and decrees of the township judiciary. But between the time of arresting a defendant, on a warrant for a debt, and the time of hearing before the justice, it is not provided what the constable shall do with his prisoner.—Other inconveniences might be mentioned. Sept. Sess.  
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Assessors and collectors are employed in proportioning and levying the county taxes.

I would have the township administration new-modelled, so as to render it competent to all township purposes, and auxiliary to those of the county, the state, and the Union.

Every township ought to be a little state, with its legislative, judiciary, and executive ; a corporation, with complete powers for the government of all its internal concerns, under such regulations and controul, as may be thought proper. And there ought to be a *town-house*, in each township, at which the different authorities of township administration ought to be exercised. Annexed to this there ought to be a *town-gaol*. Around the town-house would naturally grow a small village, which, being under the eye of the township authority, would be better regulated, and more remarkable for decency of manners, than country villages, without such superintendence, too often are. There the country manufacturers would naturally be collected, and would improve each other. And much time, now wasted in travelling from one to another, would be saved.

The legislative authority of the township ought to be vested in township commissioners, appointed, like county commissioners, and, like them, having full authority, to impose and appropriate such sums of money, as are necessary for the improvement and benefit of the township. They ought, for example, to have power to declare what roads shall be laid out and maintained at the township expence ; to direct the regulation of fences ; to provide for the support and employment of the poor, if they shall continue to be a township charge ; and, without multiplying instances, to do all things necessary for the public benefit of the township.

It has been proposed to the legislature, to employ and maintain the poor at the expence of the county. Seve-

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ral objects, now committed to the care of the townships, might be distributed, according to their magnitude, to the superior districts. There might be hospitals or work-houses, for each county, supported by the county ; for each state, supported by the state , and for the United States, supported by the United States. There might be roads supported by the county ; roads, supported by the state ; and roads, supported by the United States.— Other objects of public care might be, in like manner, distributed to the jurisdiction affected by them, in proportion to their importance.

Every man must have had occasion to regret, that the dignity of the judicial branch of government is, sometimes, not well supported, in the domestic and unsolemn manner in which the township judicial authority is exercised. For the improvement of it, I would recommend, that, though justices may issue warrants, or other original process, at their own houses, or as occasion requires, and may, there, examine any incidental question ; yet that the justice, and if there be more than one, the justices of the township, should meet, and hold a township court, for trying and determining causes, in the town-house, at stated times or court days. Every warrant or summons issued for any debt or demand, by any justice in the township, ought to be made returnable at the town-house, on the next court day, and the matter there heard by the justice or justices, in the town-court.

At the meeting of this court, every justice of the township ought openly to return into court all his domestic official proceedings, relative to convictions, or any other part of his jurisdiction.

When a constable has received from a justice, or from the town-court, any process, he will proceed to execute it. When he has arrested a defendant on a warrant for debt, he ought to have authority, like the sheriff, if bail for his appearance at the next town-court be not given, to commit him, for safe custody, to the town-jail. Before the sitting of the court, on each court day, the constable should return all his process, at the town-house.

A clerk ought to be appointed in each township, to receive all the returned process from the constable, and all the domestic proceedings from the justice or justices,



and enter them in a book, and to keep a record of all the proceedings of the town-court. This would prevent many irregularities in the proceedings of justices, from which parties before them now suffer not a little. The same clerk might also be the clerk of the township commissioners, and record all their proceedings. Sept. Sess.  
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All taxes in the township may be collected by the constable, and paid over to a township treasurer, whose duty it should be, to pay over all county taxes to the county treasurer, who would pay over all state taxes to the state treasurer.

The application and expenditure of money raised for the use of the poor, the roads, &c. may be intrusted with officers appointed for that purpose.

Every county town ought, of course, to be a borough, and every borough out to have a separate government, for its internal concerns, on the plan of a township, modelled to its peculiar circumstances.

This township administration might be applied to various useful purposes.

1. The township commissioners and justices, sitting together for that purpose, might have power to fix on the place, where a town-house and gaol should be built, and direct their building.

2. To them also might be assigned the duty of fixing the number of taverns in the township, and recommending proper persons for licences to keep taverns.

3. Public instruction is a public duty: and the constitution of this state has directed the legislature to provide for the establishment of schools.\* As various grades of schools are necessary, universities, colleges, academies, and schools commonly so called; the establishment and direction of them may be committed to the administration of the respective territory or district. There may be schools established for the United States, for each state, for each county, and for each township. The township schools may be established by the township commissioners and justices; and taxes for their establishment, and, if necessary, for their support, be imposed by the commissioners.

\* *Const. vii. 1.*

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Religion, as a part of public instruction, and an essential support of government well deserves public attention and authority, to support its ministration : and public authority might be exerted in this part of public instruction, in the same manner, as in the case of schools.

Public instruction, in these two articles, may, to some appear more exceptionable, than any other point stated in the system proposed. But I am persuaded, that, in proportion as prejudice is subdued, and the attention fixed to this subject, its importance will manifest itself. What is man without instruction ! And how slender is your hold on his mind without religion !

4. An important use might be made of this township administration, in conducting elections, one of the most interesting transactions in the administration of the government.

It has been remarked, that large assemblies are apt to be tumultuous ; and, therefore, and for the convenience of the electors, counties have been divided into election districts. But, from the present method of conducting elections, many evils arise. There is no uniformity, nor solemnity, nor regularity, nor, sometimes, honesty, in their management. The election officers are often unskilful in that, or any, kind of business ; and the places where the elections are holden, are altogether unfit for a proper or accurate manner of holding them. So that, as they are now holden, it would be much better, that there were no division of a county into election districts, and that all the electors assembled at the court-house, where there would be more means, and, from the habit of solemnity, a greater chance, for an accurate and regular election, than at the places of district election.— The inconvenience of the places of election, and the want of skill and care in the election officers, occasion many errors and frauds in the election. It has even happened, that the election officers have not been sworn, till the election was over ; and it is notorious, that they take no pains to enquire, whether those, who offer their votes are qualified as electors. It ought to be remembered, that election is a part of the administration of the government ; and, for a man not qualified as an elector, to exercise this duty, is to usurp sovereign power. For this reason, the law of Athens punished with death a

stranger, or unqualified person, who interfered in the assemblies of the people. And the introduction of a great number of strangers among the citizens of Rome, Montesquieu considers as one of the causes of the ruin of that republic.\*

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Elections might be, at the same time, convenient, regular, small, and solemn, if every township, and every borough, were severally declared a separate election district, and the electors of that district were required to meet at the town-house, and give in their votes, under the inspection of the township commissioners and justices, who, or as many of them as should attend, should conduct the election. The township clerk, or with an assistant appointed for the purpose, by the attending commissioners and justices, should, under their inspection, enter the names of the voters in a list, cast up the votes, and minute all the proceedings of the election. The solemnity of the place and the officers, from the habit of the transaction of important business, would secure a regular and solemn election. The multiplicity of districts would discourage intrigue. The present authority, and the vicinity of the gaol would repress tumult. And the smallness of the district would enable the electors, in the greatest number, and in one day, to choose all their officers, for the township, the county, the state, and the United States.

To prevent unqualified persons from voting, it ought to be required, that all the citizens in each township, qualified to vote, shall, at some township court previous to their offering their votes, have their right to vote examined by the justice or justices, and their names inscribed by the clerk, in a roll of electors, to be kept by him, digested in an alphabetical order; and that no vote shall be received at any election, from any man, whose name is not inscribed on the elector roll of the township. Without this, or a similar regulation, I see no effectual and convenient precaution against unqualified persons intruding themselves into our elections.

When the election is finished and ascertained, the result of it, so far as it respects township officers, ought to be recorded by the town clerk; and a copy of it, certi-

\* *Spirit of Laws*, B. 2, c. 2.



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Together with the result of the township election, a copy of the minutes of proceedings, as of the roll of electors, the names of the election officers, the list of voters, the number of votes for each officer and candidate, certified by the town clerk, should also be transmitted to the county town, and, after careful examination, deposited in the prothonotary's or commissioners office.

Other advantages might be stated, or occur in experience, from this township organization. The principles of this plan might be varied and improved. The county commissioners and judges might have authority to alter the arrangement of townships, and, from time to time, enlarge or lessen any of them. And it deserves consideration, whether, in each township, there ought not to be a select body of militia, whose peculiar duty it should be, to support the laws ; to any officer of which, together with the proper civil officer, any magistrate might, when he thought proper, direct his warrant.

Thus, on a general model, might be established in every neighbourhood, a particular government free and energetic, competent to afford instant protection to every peaceable man, and instantly secure for punishment every transgressor. The force of the laws would be more within the view, and nearer the feelings of all. The laws would therefore be more respected ; and, in proportion to the respect for the laws, the government would be useful, stable, and permanent.

Whether this system shall be adopted or not, it lies not with us to determine ; but it is a proper subject for the serious consideration of us all. And it is peculiarly our duty, at this time, in our several stations, to promote respect and obedience to the laws, and so to promote the efficacy and happiness of our government. And, for this end, let us proceed to enquire, whether, how, and by whom, any public law has been violated, within the jurisdiction of this court.

## No. XXII.

*Abstract principles insecure grounds of a Democratic Government, unless the People can be made wise and virtuous.*

**W**HETHER a whole people, even in a representative form, be qualified to govern themselves, remains yet a matter of experiment. The people of the United States have made the experiment ; but their government has been of too short duration, and, in the little time of its existence, has been too rudely shocked, to justify a confidence, that the experiment will be certainly successful, and may be safely tried by all nations. Man was intended by his Maker, for it is declared to be his duty, to be governed by reason ; and to acquire knowledge, for he is calculated to receive it. And, were it possible to suppose a whole people virtuous and intelligent, we might believe them capable of governing themselves. But let the enquiry be made, and in what instance shall we find, either in the more private or common concerns of life, that men are generally directed wisely or virtuously, that they do not often commit great and dangerous errors, and sometimes ruin themselves ? And is the science of government (one of the most comprehensive, delicate, and difficult of all) the only one in which a whole people can never err, which a whole people can well understand, and a whole people wisely conduct ?

In almost every thing else, we call in the senses and imagination, to aid the judgment. Our tables, our houses, our gardens, must not only be commodious and abundant, but adorned with all the decorations of art and taste. Female beauty, the most enchanting of all objects, rests not on its own charms, though heightened by virtue and wisdom, to inspire and secure regard, but seizes and arrests the attention by the splendour of ornament. Nay, religion itself, the sublime spectacle of nature, and the awful contemplation of the Deity, has been found insufficient, to excite and warm the devotions of the people, without the pomp of churches, the visions of paint-

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ing, the raptures of poetry, and the extacies of music. It is thus that even the Almighty has chosen to govern man. He has not left the preservation of the individual or the species to a cold and imperious dictate of duty, or the slow deductions of knowledge and reason, but secured obedience to his law by the impulse of appetite, and the delusions of pleasure. And it is thus, that, learning from their Maker, those, who govern man, must lead him by his senses, his impressions, and his fancies, as well as by his reason and his knowledge.

Accordingly most nations have, more or less, used the imagination and prejudices of man, as well as his reason, to govern him ; and have added to the force of power, the influence of opinion. In order to raise the imagination of the people to a due respect of his authority, some have thought it necessary to make their prince invisible, and feign him immortal. In imagination, exalted as a god, and approaching divinity, the obedience of his subjects resembles the worship of religion and the zeal of devotion. It comes from the will, and from the heart. The source is unseen, but the power is irresistible. Like mount Sinai, it is not to be touched by the people ; and his ministers, like Moses, alone approach the presence of their sovereign, and receive his laws. A regular gradation of ranks transmits them through the nation, and respect, proportioned to their stations, is attached to all, who are concerned in the administration of authority. A sanctity is supposed to be inherent in public office, as in the distribution of the blessings and the will of Heaven. Mutual respect and deference pervades the whole ; the gentle influence of opinion tempers the rigour of force ; and obedience becomes a source of comfort and pleasure.

Without some aid of this kind from opinion, it will be difficult, to maintain the balance of public authority against individual force, and preserve that superiority of reason over passion, and of right over rapacity, without which, there can never be liberty of acting within the limits of law, nor equality of enjoying the fruits of our own exertions. Without some aid, therefore, from opinion, in support of authority, it is difficult, and, if also without force, it is impossible, to maintain true liberty and true equality.

Yet the people of America have made the hazardous



experiment, of founding a government on the principles of liberty and equality, and supporting it neither by opinion nor by force. Dec. Sess. 1797.

*Liberty and equality* are not names of real objects, as a *field* or a *tree*, of whose nature we are informed by our senses. They are abstract terms, whose meaning is unfixed, and hard to be explained or understood. When liberty and equality are announced to a whole nation, as the unalienable rights of man, the question, in their practical effect, will be, not what they who declare, but what they who receive, those rights, understand by them. Their practical effect will be according to the sense in which they are understood by those who have an agency in the government. And, if the whole people have an agency in the government, their practical effect will be according as they are understood by the whole people. If they be declared to a nation of philosophers, accustomed to enquire, to compare, to reason, and to judge; they will be understood in a philosophic, rational, and just sense. But if they be declared to a people unskilled in metaphysical discussions, definitions, and relations, in logical investigations, and rational deductions; they may be received in a sense loose and uncertain, that may contradict all the rules of nature and providence, and shake the foundation and structure of any free government. And, according to the sense in which they shall be received will be their practical effects.

For, if *liberty* and *equality* be considered as the *rights of man*, and the *rights of man* as paramount to all artificial constitutions and laws; *liberty* and *equality* being abstract and undefined terms, every citizen undertakes to judge of their meaning and extent; and whenever, in his opinion, any constitution or law infringes liberty or equality, undertakes to pronounce such law or constitution void. With such principles, among an ignorant people, what government, unsupported by opinion or force, can long subsist?

That absolute liberty was never intended for man, the works of nature, and the ways of Providence, plainly show. Our capacities, our exertions, our enjoyments, are restrained. Every where, our will meets obstacles, and our wishes disappointment. Mutual dependence, and mutual restraint, is the natural lot of man.

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That absolute liberty would be dangerous to man, is not less clear. If every man were at liberty to do as he pleases, there would be an end of all safety to any. It is for the purpose of restraining absolute liberty, that governments are established.

To understand liberty, in its true sense, to ascertain its limits and relations, requires intelligence, knowledge, and reflection. But these are not to be expected in a whole people. For, among a whole people, far the greater number must spend their days in labour, and must want leisure, to cultivate their minds, and acquire knowledge. The greater number must have inaccurate, and many must have false, notions of liberty. Some will suppose that liberty is infringed, if certain laws, contradicted neither by the principles of reason, nor by the constitution, are made, and executed. Some will suppose liberty infringed, if the exercise and enjoyment of certain rights and privileges, which the interest of the state requires to be limited to some, be not extended to all. If liberty be considered as one of the rights of man, paramount to any constitution or law, and there be false notions of liberty, and those, who entertain them, have an agency in the government; the constitution and laws are in danger, in proportion to the number of those who entertain false notions of liberty.

Equality, another abstract term, in an absolute sense not less unnatural, and to be reduced to a just sense not less difficult, may have consequences not less dangerous to the government, than liberty, untempered by virtue and knowledge, by opinion, or by force.

Absolute equality of man is, in the nature of things, impossible. Nature and Providence have opposed it by impregnable barriers. Different degrees of strength and industry in body and mind must necessarily produce, even if Providence did not, by what is called good or bad fortune, promote and maintain a perpetual inequality among men. Attempting therefore, to produce or maintain absolute equality among men, is declaring war against nature and Providence, and, in that contest, no human power can ever succeed.

If equality, in its absolute sense, be impossible, and if it be published, to a whole people, as one of the rights of man, and if that whole people have an agency in the

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government, and those rights be paramount to all constitutions and laws ; its practical effect on the government will depend on the sense in which this equality ; an abstract and undefined term, is understood by the whole people.

Some will understand, by it, an equality of property ; that no man shall have more land, houses, or wealth, than another. With such, all laws, for the protection of property, and securing the fruits of industry, will be considered as infringements of the rights of man. The motives to industry will be lessened. Men will be afraid to be considered rich, lest their surplus should be seized, or subjected to extraordinary taxes. Wealth, the fruit, and the parent of industry, will be buried : and the poor will be deprived of that employment which gives them bread.

By equality, some will understand an equality of compensation. With such men, all laws giving a higher salary to a president of the United States, than to a footman ; to a member of congress, than to a door-keeper ; to a judge, than to a constable ; to a painter or clock-maker, than to a day-labourer ; will be considered as infringements of the rights of man. Thus all arts, sciences, and manufactures, would be at an end ; for there would be no motive to improvement.

On principles, like these, every act of the government may be examined and condemned. And, on such principles, what government could stand ?

If all men be equal, what better, it will be said, is an officer, than an individual, or an act of the legislature, than a resolution of a club ? Thus public authority will be brought down to the common level, despised, opposed, and destroyed.

If all men be equal, why may not the most ignorant and worthless citizen be listened to and followed, as well as the most intelligent and worthy ; or a man without any sense or knowledge be a judge or a legislator, as well as a man who has spent his life in the study of the science of law and government ? Thus all offices of government are thrown open to the ambition of all the citizens. Multiplied and endless jealousies, rivalships, calumnies, and resentments, are produced and fostered. Private and public characters and transactions are mis-



*Dec. Sess.* represented. Social and domestic peace is sacrificed to  
*1797.* the envious and malignant views of base men. And  
 quiet and happiness are destroyed.

Extravagant as these suppositions may seem, they are not unnatural; nay, we see them all carried into full operation every day. We see ignorant and worthless men court and acquire influence and popularity, aspire to office, succeed in elections and appointments, and fill important stations in the government. We see no eminence, no character, no merit, no measure, safe from ignorant, impudent, and malicious attack and misrepresentation. Of the permanence of a government thus corrupted in its source, and obstructed in its operation, what confidence can be entertained? And with the principles of liberty and equality, abstract and undefined, declared as the universal rights of man, will it not be difficult to maintain the subordination and economy of domestic life? Will not the son suppose himself equal to the father, the servant to the master? And, with such ideas, can there be any discipline of authority, any sense of filial duty, or any obligations of obedience?—And, without these, can there be any social happiness or improvement?

If we have founded a government, in the hands of the whole people, on the principles of liberty and equality, supported neither by opinion or imagination (so efficacious in the government of man) nor by force; if, with no ranks or orders in our society, with no pomp or splendour in public stations, with no religion or instruction at public expence, with no public force to secure obedience, we have founded our hopes of submission to authority, on respect for the law, the influence of reason, and a regard for duty; we must counteract the tendency to decay and dissolution inseparable from every such government, by artificial remedies, or by a virtuous, rational, and enlightened operation of the principles of our constitution.

If the people will be free and equal, if they will have an agency in the administration of the government, they must shake off ignorance and prejudice, they must be wise, they must be modest, they must respect virtue, knowledge, and the laws.

It is impossible, that a whole people can understand

the science of government. It is impossible, that they should be qualified to judge in many matters, on which they are called to act. In such cases, what must they do, if they possess not knowledge to act, and are yet bound to act with knowledge? Let them not, because they have the power, make it a point of vanity or pride, to do what they please, whether right or wrong; but let it be their pride, to do what is right. Let them reflect; let them enquire; and let them seek information not from the ignorant, but from the wise. This is what we do in all our private or common concerns of life. We never go to a physician, for advice in a lawsuit; nor to a lawyer, for counsel in a fever. We do not consult a merchant, on the best method of cultivating a field; nor a farmer, in a point of divinity. But every man is trusted in his own profession: and things are well managed, only when they are submitted to the direction of those who understand them.

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Without the influence of respect upon them, the people can neither be guided nor governed. Authority is too abstract an idea, to be the only object of respect.—There must be intermediate and visible objects, to impress the senses, and influence the mind to obedience. We have no artificial ranks or orders of men, to attach respect; and, for the efficacy of our government, and the peace of society, the people must feel and maintain, here, for the natural aristocracy of wisdom and virtue, that respect, which, in other countries, is felt and maintained for the artificial aristocracy of order and rank. By this respect, the peace of society, and the order of government, may be preserved, true liberty and true equality, in the balance of wisdom against numbers, may be supported, and the happiness of the whole people secured. Without it, ignorance will make itself equal to knowledge, folly to wisdom, rashness to prudence, and vice to virtue. All things will be jumbled together, like the chaos of matter, before the Almighty called every particle and element to its place, directed their motions, and marshalled them into order.

The people must be instructed. Public institutions for the education of youth must be established. Knowledge of the limits of freedom, and of the nature and

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extent of duty must be diffused. That the number of ignorant men having an agency in the government may, as much as possible be diminished, ignorance must, as much as possible be removed. And, that public affairs may be well conducted, and fairly examined, learning and knowledge must be spread among the people.

To the light of knowledge must be added the influence of religion. The sense of duty must be strengthened by the impressions of piety, the belief of divine Providence, and the faith of a future state. Thus the whole power of imagination, and all the sanctions of the divine law will co-operate with the dictates of knowledge and reason, and promote the practice of duty. A free nation of atheists, and of ignorant atheists, is a dreadful spectacle. And what but this is to be looked for, of a nation without public institutions for promoting learning and piety?

Public officers must be respected, as the organs of public authority. In proportion to the importance and dignity of their stations, must be the respect for their persons, and the submission to their authority. And in devoting to them this respect, it is not so much given to them, as to the efficacy of the government, the peace and order of society, and our own interest and happiness.

The laws and constitution of our government ought to be regarded with reverence. Man must have an idol. And our political idol ought to be our constitution and laws. These, like the ark of the covenant among the Jews, ought to be sacred from all profane touch. If we would preserve our government uncorrupted, and promote our own peace and happiness, we must reverence the laws, and every lawful act and ordinance of our administration. If we will have a rational government on the basis of liberty and equality, the people must themselves be rational, enlightened, wise, and virtuous; they must be modest, and willing to learn from true sources; they must be respectful of understanding, wisdom, and experience; and they must cease to listen to ignorance, folly, and flattery.

If such shall be the mind and conduct of the people, our government may, as far as any human work of the kind can, be perpetual. But if such be not the mind and conduct of the people, our government will be in-



efficient, while it lasts, and will fall by our own hands. *Dec. Sess.*  
A democratic government, among a people without *1797.*  
knowledge and virtue, is a political absurdity: it is a  
government of ignorance and vice; and Providence can  
never smile on it, nor long endure it.

But alas! I exhort in vain. It is too little in the  
nature of man, to succeed in the hope of general reform-  
ation. A people is reformed only by calamity.—  
Cassandra prophesied, in vain, to the Trojans: and they  
rejected her counsels, to avert the destruction of Troy.  
The prophets sent by God to the Jews, to warn them  
of their errors and their ruin, were disbelieved, despised,  
hated, and slain; till their city was made desolate, and  
the people led into captivity. The Son of God him-  
self, in vain, mourned over their folly and unbelief, in  
vain, exhorted them to virtue and wisdom, in vain,  
warned them of their calamity; he was held as an im-  
postor, a false teacher, and a forcerer; and their name  
was blotted out from among the nations.

That you, however, a select body of the people, call-  
ed out on this jury, to execute a particular and impor-  
tant public duty, will discharge your trust, with that  
vigilance and respect for the laws, which a regard to  
the peace of society, and the energy of the government,  
demands; I confidently expect, and firmly believe; and  
to this discharge I shall heartily contribute, the aid of  
professional principles and experience.

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No. XXIII.

*Qualifications of Electors.*

**I**N a representative government, composed of several *March*  
branches, to each of which distinct portions of the *Sessions,*  
general authority is committed, it is essential, that *1798.*  
the constitutional authority of each be free from all con-  
trol, check, or influence out of itself. Within itself  
alone must each branch find the motives of its action.  
For, if any external impulse or interference affect it,

*March Seff.* that part of the government is no longer exercised by  
 1798. the constitutional branch, but by that and some other.  
 { Power becomes usurped by those exercising it without  
 constitutional authority, and the government is changed  
 and corrupted.

Of all the branches of administration the importance of none is less justly estimated, than of the elective branch. That which possesses the power of all appointment must necessarily influence the whole of the administration. It is of the greatest moment therefore, that the power of election be preserved from impure or improper hands, and be exercised with integrity and wisdom.

A great and important share of the elective authority is in the hands of the people. It is therefore essential, that it be ascertained who are the people: for if any not of the people interfere in the exercise of the elective authority, power is usurped, the constitution and administration of the government is violated, in the same manner as if any other public trust, office, or duty is exercised by any not lawfully appointed to it.

In the United States it is, more than in any other nation, important, that it be well ascertained, who are the people. For in this, more than in any other nation, there is a vast concourse of strangers from different parts of the world, of a great variety of habits, manners, principles, opinions, and prejudices: some, like birds of passage, to seek in this country only a temporary residence; and others to find in it an habitation and a grave for themselves and their posterity.

At this time too, the number of such has been unusually great. The revolution in France, the commotions in other parts of Europe, and the insurrections in the West-Indies, have driven vast multitudes of all characters and colours, to seek, in the United States, a refuge from punishment, calamity, or misery. How could our government prosper, were all such strangers suddenly to be admitted to act upon it! Time must be taken for examination of their dispositions and conduct, and for their instruction in the nature of our interests and duties, and a just discrimination and selection must be made, before strangers, by being admitted into the number of the people, can be suffered to share in the administration of our government.

The constitution of Pennsylvania, as it defines and arranges the other branches of the government of this state, defines also the people, or that part of the elective branch which is composed of the citizens in their individual capacity. It declares, that, "in elections by the citizens, every free man of the age of twenty-one years, having resided in this state two years next before the election, and, within that time, paid a state or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector; provided, that the sons of persons qualified as aforesaid between the age of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes." *March Sess. 1798.*

The constitution of the United States directs, that the members of the house of representatives of congress shall be chosen by the people of the several states qualified as electors of the most numerous branch of the state legislature; and the electors of the president and vice-president of the United States, shall be appointed in each state, in such manner as the legislature thereof may direct. The legislature of this state has directed, that the electors in this state for choosing a president and vice-president of the United States shall be chosen by the citizens qualified to vote for members of the general assembly. So that all popular elections in this state are regulated by the principles of the state constitution.

All laws relative to elections, as affecting the vital principles of our government, ought to be sacredly respected, and strictly executed. And the rights of electors, like the prerogatives of sovereignty, ought to be guarded from encroachment by the usurpation of unqualified persons. I shall therefore here give a detailed view of the qualifications of an elector, as prescribed by our constitution and laws.

The qualifications of electors are five;—1st. Age, 2d. Freedom, 3d. Property, 4th. Residence, and 5th. Citizenship.

1. Our laws presume, that infants, that is all persons under the age of twenty-one years, want discretion to act for themselves, and, therefore, generally declare



*March Sess.* the acts of such void. If they be incapable of judging  
 1798 in the management of their private concerns, they must  
 also be incapable of judging in the management of public concerns; and are therefore excluded from voting at elections: for no man can vote, unless he be of the age of twenty-one years. This has always been the law of Pennsylvania.\*

2. Not only discretion, or the right management of the judgment; but freedom of will is necessary for a just exertion. To discretion, therefore, must be added liberty of action; and an elector must not only be of age, but he must be free.

3. Property, together with discretion and freedom, is a necessary qualification of an elector.

By the laws agreed on in England, by the governor and freemen, in 1682, it was declared, that every inhabitant in the province that shall be a purchaser of one hundred acres of land, and every person who shall have paid his passage, and taken up one hundred acres of land at one penny an acre, and have cultivated ten acres thereof, and every person that hath been a servant or bondsmen, and is free by his service, that shall have taken up his fifty acres of land, and cultivated twenty thereof, and every inhabitant, artificer, or other resident in the province that pays scot and lot to the government, shall be deemed a freeman of this province, and be capable of electing and being elected a representative of the people in the general assembly.†

By a law of 1705, it was declared, that no inhabitant shall have a right of electing or being elected, unless he be a freeholder, and have fifty acres of land well seated, and twelve thereof cleared and improved, or be otherwise worth fifty pounds clear estate.‡

The Pennsylvania constitution of 1776 declared, that all freemen, having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office.§ And, with

\* *Laws agreed on in Eng. 1 St. L. App. 22. Const. of 1776, c. 2, sect. 6. Const. Art. 3, sect. 1.*

† *1 St. L. App. 22.*

‡ *1 St. L. O. Ed 36 203, 325.*

§ *C. 1, sect. 7. 1 St. L. App. 55.*

respect to property, what is meant by common interest *March Sess.*  
and attachment, as a qualification for voting is having, *1798.*  
within one year next before the election paid public  
taxes.\*

The present constitution of this state declares it to be a necessary qualification of an elector, that he shall have within two years next before the election, paid a state or county tax assessed at least six months before the election.†

The constitution of 1776 having provided, that sons of freeholders of the age of twenty-one years, shall be entitled to vote, although they have not paid taxes;‡ the present constitution extends this privilege to the sons of qualified electors generally, but limits its operation to the year which elapses between the young man's arrival at the age of twenty-one, and his arrival at the age of twenty-two years:§ so that, if he be twenty-two years of age, he cannot vote, unless he be qualified by the payment of taxes. The reason of this provision perhaps is, that their fathers' property, while they are supposed to remain under his jurisdiction, is a common interest; and, as they are not liable to personal taxes, until they arrive at the age of twenty-one years, and as this may happen after an assessment, and before an election, an act of the law exempting them from taxes, shall not deprive them of the privilege of voting, till this exemption ceases, and, within another year, they have an opportunity of being assessed and paying taxes.

On this principle, it was declared, by the election law of 1786, that no minister of the gospel, mechanic, manufacturer, or schoolmaster, shall be considered as disqualified from giving their votes at any general election, on account of any exemption from taxes imposed by the funding law of this state.¶ But as these taxes no longer subsist, the exemption and exception ceases of course.

It is clear that the qualification of payment of taxes is here required as an evidence of property, or interest

\* C. 2, sect. 6. 1 St. L. App. 56.

† C. 2, sect. 6.

‡ 2 St. L. 461.

§ Art. 3, sect. 1.

¶ Art. 3, sect. 1.

*March Sess.* in the community. A man therefore once qualified, in  
 1793. point of property, may lose his qualification by losing  
 his property, for he must have paid taxes within two  
 years next before the election.

But if, within that time, no taxes have been assessed, this is an exemption by act of the law, and ought not to operate as a disqualification, provided there be evidence of taxable property and a faculty of paying taxes.

To prevent a collusive payment of taxes, for the purpose of thereby acquiring a qualification, the taxes, the payment of which will be a qualification, must have been assessed six months before the election: and they must be either a state or a county tax; for the payment of a township tax is no qualification.

4. Residence within the state is another qualification to entitle to vote, and is required probably to give the elector an opportunity of learning characters, interests, and duties. And, for the same reason, it must be a residence immediately before the election.\*

By a law of 1705, it was enacted, that no inhabitant shall have a right of electing or being elected, unless he have been resident within the province two years before the election.† And by a law of 1743, it was declared necessary, before a foreigner could become a citizen or subject, and, of course, before he could vote at any election, that he should have inhabited seven years in this province, and not been absent out of it, or some other of the colonies, longer than two months at one time during those seven years.‡

By the Pennsylvania constitution of 1776, residence in the state for the space of one whole year, next before the day of election, was required as a necessary qualification of an elector.§ And, by the present constitution, which is the governing rule on this point, a residence in the state two years next before the election, is required as a qualification.||

Though the election laws, previous to the revolution,

\* *Absence occasioned by public business of the United States or of this state is no disqualification for an appointment as a member of assembly. But there is no such provision in favour of electors.*

† 1 St. L. O. Ed. 36.  
 § C. 2, sect. 6, 42.

‡ 1 St. L. App. 46.  
 || Art. 3, sect. 1.



distinguished between natural born subjects and foreigners, by requiring from subjects, a residence of only two years,\* and from foreigners a residence of seven years;† yet the Pennsylvania constitution of 1776, made no such distinction, but required the same residence of one year from both. And though the present Pennsylvania constitution requires the same residence of two years, which was required before the revolution, and though it had been before stipulated by the articles of confederation, that *the free inhabitants*,‡ and by the constitution of the United States, that *the citizens* of each state shall be entitled to all privileges and immunities in the several states;§ yet the present Pennsylvania constitution has made no difference between a citizen of the United States coming from any other to reside in this state, and the subject of a foreign power coming to reside in this state, and requires indiscriminately from all the same qualification of two years residence.¶ This injustice is now corrected by the naturalization law of the United States, which requires from aliens a residence of five years within the United States previous to admission as citizens, and so brings back the qualification to nearly what it was in this state before the revolution; except that then a residence of seven years, and now only of five years is required for admission as a citizen.

5. Citizenship is another qualification necessary in an elector.

All nations distinguish between their own citizens and foreigners residing among them. Citizens are either by birth or naturalization. Citizens by birth owe permanent allegiance, and possess correspondent rights, from their nativity. Resident foreigners do not owe permanent allegiance, nor possess any right of citizenship, until they take an oath of allegiance, and be naturalized or declared citizens.

Of all the rights of citizens none is more important, than that of election; and, in no country is that acquired so easily as in this country. But no foreigner can, or from its early settlement could, in Pennsylvania, acquire the rights of a citizen (especially that of discharg-

\* 1 St. L. O. Ed. 36.

† 1 St. L. App. 46.

‡ Art. 4.

§ Art. 4, sect. 2.

¶ Art. 3, sect. 1.

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*March Sess.* ing the duty of an elector) till after he has taken an oath of allegiance, and been naturalized. He must owe permanent allegiance to some government; and he owes none to this, till he hath taken an oath of allegiance to it. He is an alien, and no citizen, till then. And, before that, to exercise any right of citizenship, is usurpation of unlawful power. It is entering on an office, without taking the oath of office. Such has been the uniform law of Pennsylvania from its early times.

The laws agreed on in England, by the first adventurers into this colony, were framed between and for fellow subjects of the same king, who all, from birth, owed permanent allegiance to their sovereign, and from whom no oath of allegiance was necessary. They were all natural born subjects, and no aliens. And they were not about to remove into the jurisdiction of a new sovereign, but to remain under the same, in which they were born. From such emigrants an oath of allegiance would have been superfluous.

But as soon as the circumstances of aliens becoming resident in this colony was attended to, in the year 1700, a law was passed reciting, that some of the people living in, or likely to come into this province, are foreigners, and not freemen according to the acceptation of the laws, the consequences of which might prove injurious to the prosperity of the province; and therefore empowering the governor, by instrument under the broad seal, to declare any alien settled within this government, having first made and given his solemn engagement to be true and faithful to the king and the governor, according to the laws and usages thereof, before the governor, to be completely naturalized.\*

In 1705, it was declared by law, that no inhabitant shall have a right of electing or being elected, unless he be a natural born subject of England, or naturalized there or here, and a freeholder, and have been resident within this province two years before the election.†

In 1743, it was enacted, that all protestants born out of the king's liegiance, having inhabited seven years in this province, and not been absent out of it or some other of the colonies, longer than two months at one time, du-

\* 1 *St. L. App.* 35.

† 1 *St. L. O. Ed.* 36.

ring the same seven years, who shall make and subscribe the declaration of fidelity, and the profession of Christian belief, and take and affirm the effect of the abjuration oath, before any judge of the supreme court of this province, shall be deemed the king's natural born subjects.\*

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By acts of assembly passed in 1746 and in 1766, election inspectors were authorized to administer an oath of his qualifications to any elector, and one of the qualifications to which any person coming forward as an elector, if a foreigner by birth, was required to swear, was, that he had been, in due form of law, naturalized; and the votes of those who refused to take such oath were to be rejected.†

So stood the law, when the declaration of independence proclaimed these colonies free and independent states, absolved them from all allegiance to the British crown, and totally dissolved all political connection between them and the state of Great Britain.

In consequence of this declaration, all the natural born or naturalized subjects of Britain, then inhabitants of this state, renounced their allegiance to Britain, and owed a permanent allegiance to the new government of this state and the Union; "and they held all their British brethren out of these states, as they held the rest of mankind, enemies in war, in peace friends."‡ So that if any of the inhabitants of Britain or its dependencies, thereafter emigrated into the United States, they were to be received not as fellow citizens, but as aliens or foreigners; and all the laws applicable to foreigners, were to be applied to them.

The Pennsylvania constitution of 1776, in the 42d section of the plan of government, introduced a new rule, and declared, that every foreigner of good character, who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative unless after two years residence.§ And, in conformity to this, one of the test laws of 1778 declared strangers

\* 1 *St. L. App.* 46.

† 1 *St. L. O. Ed.* 37, 203, 325.

‡ 1 *St. L. App.* 53.

§ *C. 2. sect.* 42.



*March Sess.* from beyond seas entitled to the privileges of freemen,  
 1798. on taking the prescribed oath of allegiance before some  
 justice of the peace.

But as all the citizens of the United States, at the time of the declaration of independence, had been subjects of a foreign power, it was thought necessary to exact from them a declaration of their allegiance to the new government. By various laws, passed in 1777, 1778, and 1779, all male white inhabitants above the age of eighteen, were directed to take an oath of allegiance to this commonwealth. And, by a law of 1777, every person coming to vote for members of assembly, was required to produce a certificate of his having taken the oath of allegiance, and, unless he did produce such certificate, or then take such oath, the inspector was forbidden to receive his vote.\* A similar provision was made by the election law of 1785, which enacts that no male white inhabitant of this state, resident therein, and above the age of eighteen on the 1st of October 1779, shall be admitted to vote at an election, who hath not taken the oath of allegiance and abjuration within the time limited by the act of that date, or, if he was then under the age of eighteen, and hath since attained his full age, if he have not taken such oath, and do not produce a certificate thereof, or if his certificate be lost, make oath or affirmation of his having taken the same; and no man who hath removed to this state from some other of the United States of America, since the said 1st of October, though he have brought with him a certificate of his taking the oath of allegiance to the state whence he removed; nor any stranger from foreign parts, who has come into this state, although he have resided therein one full year, shall be admitted to vote at such election, unless he produce to the proper inspector an authentic certificate of his having taken the oath of allegiance. And it is part of the oath prescribed by the same law to the inspector, that he will not receive any vote from any elector, until he produce a certificate or other sufficient proof of his having taken an oath of allegiance to this commonwealth.† So the law yet remains, as to all strangers from foreign parts,

\* 2 St. L. O. Ed. 72.

† 2 St. L. 348, 353.

who have emigrated into this state since the declaration of independence. But with respect to those who, at the time of the declaration of independence, were subjects or inhabitants of this state, a law passed in 1789, reciting that oaths or affirmations of allegiance, abjuration and fidelity, from time to time required of the citizens of this commonwealth, however proper and expedient, during the late war, when it was necessary for individuals to testify their attachment to one or other of the contending parties, since the restoration of peace, and the establishment of government, have become unnecessary; declares that all acts, which require any oath or affirmation of allegiance or fidelity to this commonwealth from the subjects or inhabitants thereof, or of abjuration or renunciation of any foreign power, or which imposes any penalty or disability on any person or persons for having refused or neglected to take such oath or affirmation, are repealed; and that all persons who from not having taken the said oath or affirmation, were, by force and operation of the acts of assembly relating thereto, excluded from certain privileges, shall be placed on the same footing with the other citizens. The same law, however, provides, that nothing therein contained shall alter or affect the 42d section of the plan of government of this commonwealth; and proceeds to prescribe the form of the oath or affirmation of allegiance, which (the laws prescribing the form being thus repealed) shall thereafter be taken by every such foreigner, as is in the said section mentioned.\*

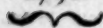
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What effect will this law have on the election law of 1785? This law of 1785 requires evidence of an oath of allegiance from three kinds of persons before they are permitted to vote; 1st. from all citizens of this state, though born here, or resident here, at the time of the declaration of independence; 2d. from those who have removed into this, from any other of the United States, though they have taken an oath of allegiance to any such other state; and 3d. from all strangers from foreign parts. With respect to the first kind of citizens, the law of 1789 removes the necessity of any evidence of an oath of allegiance. With respect to the second kind, citizens of other states, removed and resident in this state, the esta-

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blishment of the constitution of the United States seems to require, that the same exemption from any such necessity should be extended to them. But with respect to the third kind, strangers from foreign parts, the nature of the case, the constitution of 1776, and the law itself, shew, that it could not be, and was not intended to exempt them from the obligation of an oath of allegiance.

It is evident, therefore, that this law repealed only those acts which imposed an oath, as a test whether citizens of this state adhered to the United States or to their enemies; and, of course, relieved from the disabilities of those laws only natural born or naturalized citizens, all who were citizens at the time of the declaration of independence, or had been born here since; and did not alter the condition of any who, since the declaration of independence, had removed from foreign parts into this state. The object of the test laws was to disqualify what were called *tory* citizens; the object of this repealing law was to remove that disqualification. It was the intention of this law to remove the distinction not between citizens and aliens, but between citizens and citizens; to qualify *tory* citizens, not to *naturalize* aliens; to repeal the test laws, not the naturalization law. The law of naturalization was established by the constitution; which the assembly, while they knew they had not the power, declared they had not the will, to alter or affect. The rule of the constitution did not, in consequence of this law, cease to affect all foreigners coming into this state, since the declaration of independence. The test laws, while they existed, answered the double purpose of a test of the allegiance of the citizens of this state, in their choice of sides between the United States and Britain, and, in pursuance of the constitution, a declaration of the allegiance of foreigners when naturalized. And this law, which repealed the test laws, prescribed, in pursuance of the constitution, a form of declaration of allegiance by foreigners, when thereafter to be naturalized. And by this form, all foreigners, who since the declaration of independence, had come into this state, were, in pursuance of the constitution, thereafter to be naturalized; until congress should establish an uniform rule of naturalization throughout the United States.



For the constitution of the United States, in order *March Sess.*  
to form a more perfect Union, presented to foreign na- *1798.*  
tions, not thirteen several sovereignties, but one gene-  
ral sovereignty, and vested congress with power "to  
establish an uniform rule of naturalization, throughout  
the United States."\* This power congress did not  
execute, till the 26th March, 1790, when it empowered  
any common law court of record, in any one of the  
states, on the application of any person of good charac-  
ter, resident therein for one year, and within the United  
States for two years, to administer to him the oath or  
affirmation prescribed by law, and record the application  
and proceedings; and thereupon he was declared to be  
a citizen.† But this law congress afterwards repealed  
by a law of 29th January, 1795, which directed the  
only form which now exists, of admitting any alien to  
become a citizen of the United States.‡

By that law,—1st. The alien intending to become a  
citizen, must three years at least before his admission,§  
declare, on oath or affirmation, before the supreme, su-  
perior, district, or circuit court, of some one of the  
states, or of the territories north-west or south of the ri-  
ver Ohio, or a circuit, or district court of the United  
States, that it is his intention to become a citizen of  
the United States, and to renounce forever all foreign  
allegiance.—2d. When applying for admission, he must  
declare, on oath or affirmation, before some one of the  
courts aforesaid, that he has resided within the United  
States five years at least,§ and within the state or ter-  
ritory, where such court is held, one year at least, that  
he will support the constitution of the United States,  
and doth renounce all foreign allegiance.—3d. The  
court must be satisfied, that he has resided within the  
limits, and under the jurisdiction, of the United States,  
five years, and that, during that time, he has been of  
good moral character, attached to the principles of the  
constitution, and well disposed to the good order and  
happiness of the United States.—4th. If he have borne  
any order of nobility, he shall expressly renounce his  
title.

\* Art. 1, sect. 8.

† 3 U. S. L. 172.

‡ 1 U. S. L. 133.

§ See postscript annexed to this.

*March Sess.* 1798. These are the terms, on which aliens coming into the United States, after the date of the law, are to be admitted to become citizens. With respect to any alien residing, at the date of the law, within the limits and jurisdiction of the United States, he may be admitted to become a citizen, on his declaring, on oath or affirmation, in some one of the courts aforesaid, that he has resided, two years at least, within the jurisdiction of the same, and one year at least, within the state or territory where such court is held; that he will support the constitution of the United States, and abjures all foreign allegiance; and the court being satisfied, that, during the said term of two years, he has been of a good moral character, attached to the constitution, and well disposed to the good order and happiness of the United States; and, if he have borne any hereditary title, or been of any of the orders of nobility, on renouncing his title, he shall be entitled to admission as a citizen.

Both these laws provide, that the children of persons duly naturalized, dwelling within the United States, and under the age of twenty-one years, at the time of such naturalization; and the children of citizens of the United States born out of the jurisdiction of the United States, shall be considered as citizens of the United States. But the right of citizenship shall not descend to persons, whose fathers never have been resident within the United States.

It is evident, that, since the 26th of March, 1790, when congress first exercised its constitutional authority of establishing an uniform rule of naturalization, the naturalization laws of every state absolutely ceased.— For, if they could exist together with the law of congress, the end of the constitution, an uniform rule of naturalization, would be defeated. If by the law of any individual state, an alien could become a citizen of that state, he would, of course, by virtue of that clause of the United States constitution, which gives to citizens of each state all privileges and immunities of citizens in the several states,\* become a citizen of every state, that is of the United States, without conforming to the law of the United States. And if, by thus becoming a citi-

\* Art. 4, *sec.* 2.

zen of a state, he could be qualified to vote for the most numerous branch of the state legislature, he would, of course, by virtue of that clause of the United States constitution, which declares by whom the house of representatives of the United States shall be chosen,\* be also qualified to vote for members of the house of representatives of the United States. So that all principles on this subject would be confounded. *March Sess.*  
1798.

On this ground, the present constitution of Pennsylvania, though it does not repeal the 4th section of the act of assembly of 1789,† which was superseded by the act of congress of 1790, did not, like the Pennsylvania constitution of 1776, adopt any rule of naturalization; because the constitution of the United States had before vested in congress the power of naturalization, and they had executed that power.

It is now, therefore, not proper to say, that an alien has become a citizen of a particular state, but that he has become a citizen of the United States; and it is only on the terms of the law of the United States, that aliens can become citizens in any state.

In no country, are so important privileges so easily offered to all men of good character. That aliens, before they are admitted to these privileges, should be known to deserve them, and to be permanently attached to this country, its essential interests require. Every petty corporation prescribes certain terms of admission to its rights. Even a free mason society has solemnities of admission. And shall then no formalities, and investigation of character and intention precede admission to the high privileges of a citizen of a sovereign republic?

We see then, that, to qualify a man to vote at any election, all these circumstances must concur. He must be of the age of twenty-one years, free, and a citizen; he must have resided in this state two years next before the election; and, within that time, he must have paid a state or county tax, assessed at least six months before the election.

Waving, however, at this time, the mature consideration of these principles; and reserving, for the time when

\* *Art. 1, sect. 2.*

† *2 St. L. 677.*



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Waving, however, at this time, the mature consideration of these principles; and reserving, for the time when

\* *Art. 1, sect. 2.*

† *2 St. L. 677.*

*March Sess.* it will be our immediate duty to act on them, their  
 1798. full operation on our minds ; let us proceed to enquire  
 ~~~~~ into the offences, by which the peace of the state has  
 been disturbed in this county.

P O S T S C R I P T.

By a law of congress since passed, on the 18th of June 1798, supplementary to the law of 29th January, 1795, the terms of naturalization are again altered. The alien must now, in the manner before prescribed, declare his intention to become a citizen, five years at least before his admission, and must, at the time of his application for admission, declare and prove, to the satisfaction of the court having jurisdiction in the case, that he has resided within the United States fourteen years at least, and within the state or territory where such court is held five years at least ; besides conforming to the other declarations, renunciations, and proofs by the former act required. Any alien, who was resident within the limits and jurisdiction of the United States, before the 29th January 1795, may within one year after the passing of this act ; and any alien, who has made the declaration of his intention to become a citizen, in conformity to the provisions of the act of 29th January 1795, may, within four years after having made the declaration aforesaid, be admitted to become a citizen, in the manner prescribed by that act. But no alien, who is a native, citizen, denizen, or subject of any nation or state with whom the United States are at war, at the time of his application, shall be, then, admitted to become a citizen of the United States.

This law also requires a registry of aliens resident or arriving in the United States. And, with respect to aliens arriving in the United States after the date of the law, the date of the registry is to be considered as the commencement of their residence ; and a certificate of the registry, in proof of the term of residence, must be produced to the court to which application for admission is made.

Though the words in the former and present constitution of this state are positive and not exclusive, yet, in describing the qualifications of electors, I have used ex-

clusive words; because the legislature had made no exceptions, but as I have stated, from the qualifications stated in the constitution; and because the election law of 1785 had, in some cases, used exclusive words. *March Sess.* 1798.

But the election law of 15th February 1799, having adopted this construction, has left no room for doubt.— By this law it is declared, “that no person shall be admitted to vote at any general or special election or for inspectors,” other than those qualified in the terms of the constitution.

This law declares that every person claiming to vote shall make due proof; 1. That he is a natural born citizen of this state, or was settled therein on 28th September 1776; or, having been a foreigner, who since that time came to settle therein, that he hath taken an oath or affirmation of allegiance to the same on or before the 26th March 1790, or been naturalized conformably to the laws of the United States since that time. Or 2. That he is a natural born citizen of some other of the United States, or has been lawfully admitted or recognised as a citizen of some one of the said states, on or before the 26th March 1790, or of the United States since that time. The proof to be required of this qualification, is also prescribed by this law. If the person claim to vote as a natural born citizen of this, or any other state, or as resident in this state on 28th September 1776, the evidence to be given of this is his own oath or affirmation. If he claim as having taken an oath or affirmation of allegiance to this state, or as having been lawfully admitted or recognised as a citizen of some other of the United States, on or before 26th March 1790, the evidence is a certificate from some judge, prothonotary, or clerk of a court, mayor, alderman, recorder, or justice of the peace, or his own oath or affirmation. If he claim as having been naturalised or admitted a citizen of the United States, the evidence is a certificate under the seal of the court wherein such naturalization took place conformably to the laws of the United States.

No. XXIV.

Experiment the true source of knowledge; and that is the best Government, which best secures social and domestic happiness.

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1798.

IT is only in mathematical science that absolute certainty is attainable. In other parts of human knowledge, our belief is founded on probability, more or less strong, according to the extent of experience from which the probability has been deduced.

It is by means of experiment, that science has been usefully cultivated, and scientific truth discovered.—While men rested their opinion on theories and systems, how wild were their errors, and how ridiculous their knowledge! In astronomy, and in all the parts of natural philosophy, what strange absurdities were received, as maxims of science and principles of doctrine! Every new system was but a new variety of delusion. And, while the only avenue that leads to scientific light remained unexplored, mankind was doomed to wander in darkness. To eat his bread by the sweat of his brow is not more the doom of man, than to be wise only by experience.

In proportion to their error was their presumption. Every system-maker delivered his doctrines with the confidence of authority. As it rested only on imagination, it could as well comprehend all, as any part of nature. All knowledge was supposed to be attained; and the fiction of fancy was received as the revelation of God.

Since a Bacon pointed out, and a Newton explored, the way to knowledge in natural philosophy by experiment, its various branches have been cultivated by patient and judicious experiments of ingenious men. Discarding all systems and theories, and setting out in pursuit of truth as if they knew nothing, they pursue her step by step; and, as they discern their ignorance, they abandon their presumption. But, though their progress be thus limited, it is sure; nature, not fancy, is their guide; and if they carefully follow her, they will be led straightly,

though slowly, on. Whatever be the walk which he may choose, it is but seldom, that the life of one enquirer suffices to conduct him to its end. But another starts, where he stopt, and the end is reached at last. Even metaphysics, of all sciences the most subject to uncertainty, because the least subject to experiment, when traced, as nearly on the principles of experiment, as the science will admit, begin to reflect the beams of the rising sun. A Reid, and a Stewart, attending less to the delusions of fancy, than the patient investigation of truth, have deduced principles, on which the mind seems to rest with confidence.

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It seems strange, that in an age when experiment is considered as the only road to knowledge, and when all other sciences are cultivated by means of experiment, there is one science, originally drawn rather from practice than theory, in which the result of experiment seems to be abandoned, and theory and system substituted as the foundation of knowledge. Government has often, or generally, been founded by accident, and corrected by experience of its defects. The science of government has been derived from observation of its origin, progress, and decay. History is the record of experiments made in this science, and is, therefore, the true source of knowledge of it, and the best guide for instruction. Yet now all past experience seems to be disregarded, and all attention to practical consequences laid aside. A new system of politics is devised, as the perfection of this science; and, without consulting the nature of man, or the record of experiments in government, (the only source of just knowledge,) philosophers and reformers have raised a system of political science on abstract principles, liberty, equality, and the rights of man. And those abstract principles, without respecting the differences in character, knowledge, and state of society, they adopt indiscriminately, as the proper basis of government in all countries.

That equality is a proper measure for the distribution of power, or that an uniform measure for the distribution of power is proper for all countries, may or may not be true, according to circumstances. It is proper to distribute power according to capacity to use it, or

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temptation to its abuse. In some countries, men in general, and, in all countries, some men, are incompetent for the right exercise of power, or will certainly abuse it. That power may be useful, it must be distributed into the hands best qualified to exercise it. And to justify an equal distribution of it, as an abstract and universal principle, there ought to be an equality of skill, capacity, and virtue. Without this, equality of power may, in the language of scripture, be *a price put into the hands of fools*.

Mr. Burke has expressed an idea, which seems very just, and deserves attention. I do not recollect his expressions, nor his idea accurately. In speaking of the sentiments of the people of England on a political subject, he reckons only those who have a will of their own, and are capable of forming a judgment of the subject; and, I think, he reckons them about the one eighth of the whole. Therefore, and justly, he prefers the opinion of this one eighth to that of the other seven eighths, and considers it as the real opinion of the people. Number of opinions is certainly a very inadequate scale, by which to measure truth. And respect for the decision of a majority will always be in proportion to the comparative and real degree of their capacity and impartiality. Because all have a right to vote, we cannot, therefore, conclude, that the majority makes the best choice, unless we also know, that they, or a greater number of them than the minority, are more capable of choosing than the minority. The choice, whether best or not, is legal, and must be respected, as stamped with public authority. But public authority cannot change the nature of things. It is common to say, that the people always *think* right. It seems more just to say, that the people always *feel* right. The people often think not at all, they often think wrong, from ignorance, prejudice, and misinformation; and perhaps they do not often think right, till the subject has been submitted, not only to their reflection, but to their feeling. This is meant of the people in the common sense, the whole people. According to Mr. Burke's idea, considering, as the people, only those who have freedom of will, and capacity of mind to form a judgment on any subject, in the opinion of this people, we have reason to confide, as

generally at least, if not always right. It is the best standard of truth, that we have to appeal to, and, as the voice of reason and understanding, it is the voice of nature or of God. But wherever, in taking the opinion of the people, you go beyond this number, your confidence must be diminished, in proportion to the number of false judgments mingled with true; as gold is adulterated by the mixture of alloy.

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True practical civil liberty is a government of useful laws. Where the laws are useful, and are universally submitted to, there is true practical civil liberty. It is of no practical importance, whether those laws be made by one, or by the whole people: provided he or they who make them, understand the interests of the whole people, and the means of promoting those interests, and zealously exert those means. In the debates in the British house of commons, on a motion for a reform of parliament, it was asked, whether the interests of Manchester, and other large towns, which had no representation, were less attended to in that house, than the interests of towns which chose representatives. If good laws be made, of what practical consequence is it to the people, that they do not make the laws, or have no right to choose the makers of the laws? Of what practical use is it, provided the laws are good, that I have a right to assemble at the place of election, to vote for men whom perhaps I do not know, to make laws on subjects which I do not understand. If the laws be good, and well executed, the people are free, and a people may be free, though they have no share nor influence in the administration of the government.

Mr. Burke's natural representation of the people, the intelligent, virtuous, and independent part of the community, or some abstract of that, possessing the greatest degree of intelligence, virtue, and independence, is certainly the best depositary of public authority. Giving to any part of the community, other than this natural representation, any authority or influence, in the government, is practically corrupting the system, in proportion to the quantity of ignorance, vice, or weakness, that you thus vest with authority. It is giving to folly or wickedness, a check or predominancy over wisdom and

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virtue ; and it is therefore reversing the order of nature, and the institutions of God. God hath made men different in powers, and it is in vain for human institutions to attempt to make them equal.

To have true practical liberty, the laws ought to be made by those who possess the highest degree of virtue and understanding, and, if made by chosen representatives of the people, those only ought to have power of choosing, who are men of virtue and understanding.— This is the natural representation of the people, and any artificial representation, different from this, is, so far as it differs, a deviation from nature and reason.

The rights of man are various. The most essential are the right of acquiring and enjoying property, and of participating in the enjoyment of those natural benefits, which are unsusceptible of appropriation, as air and light ; the right of personal liberty, the use of our corporeal faculties, unrestrained by the force or fear of each other ; the right of liberty of thought and conscience, the use of our mental faculties in deliberation and judgment.— These, and all the rights of man, have their limits. The rights of each man must be so bounded, as not to encroach on those of another. No man must be the judge of the extent of his own rights : this must be referred to the determination of the law, the voice of the community expressed by public authority. It is for the protection of these rights, that government is instituted, and wherever these are protected, and the people secured in the just enjoyment of them, there is true liberty and equality ; a liberty of doing what is right, and an equality of enjoying what we can lawfully acquire. Wherever these rights are protected by public authority, there is liberty, though the people should have no share in the government. And wherever these are not protected, there is slavery, though the whole government be in the hands of the people. It is not in authority, station, or wealth, any more than in stature or complexion, that happiness consists. And though these may be varied in infinite degrees, there may be equality of happiness. It accords with the whole system of nature, that those should be varied. And individuals differ from each other in happiness, not according to the quantity of any of those which they possess, but according to the manner in which

they enjoy what they possess. If you examine the different classes of civil society, as distinguished by those circumstances, you will find a difference of happiness among the individuals of each class, but an equality of happiness among the classes ; and that, though all men be not, all stations are equally happy. Wherever those rights of man, the right of property, the right of personal safety, and the right of conscience, are protected by government, there civil, social, and domestic happiness is secured. And wherever civil, social, and domestic happiness is secured, the great purpose of government is accomplished, and true practical liberty is established.

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That liberty, or a government of useful laws, should be best promoted by equality of power, is impossible ;—so long as all men are not equally wise. Supposing them equal in virtue, it is clear, that this liberty can only be secured by vesting all the powers of government in only the wise men of the nation, and withholding from the ignorant and foolish all authority and influence. This will be still more necessary, if it be true (and I think experience will confirm it) that there is the best chance of finding most virtue, where there is most wisdom. This distribution of power, however, is impracticable, from the difficulty of establishing a standard of wisdom ; and the right to authority or influence in the government must be ascertained by some other criterion than wisdom. But it is clear, that, in so far as any claim to power and influence, other than wisdom and virtue, is adopted, the government is so far corrupted. And, in all countries, equality of power must introduce a greater or less degree of corruption in the government.

Equality, therefore, is not, of itself, a proper principle in the government, and is proper only with respect to something else. While there are different degrees of understanding, equality of power must be an evil, and is admissible, as a principle of government, only with a view to avoid a greater evil. As all men are not equally wise, so neither are all men equally virtuous. Nor, though there is the best chance of finding virtue, where there is wisdom, is it certain, that wisdom is always accompanied with virtue. To trust, therefore, the interests of all into the hands of only some, however wise they

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may be, may perhaps not be safe, unless they be also virtuous. Therefore equality of power, though not justifiable on absolute principles is admitted in some governments as a mean of preventing abuse of power. It is one of those remedies, which, in the imperfect state of man, we apply to evils, which we cannot remove.

Yet, like many other remedies, it is too often ineffectual, and sometimes even increases the danger, which it is intended to prevent. Survey the different governments in the world, and you will not find liberty, or useful laws, in proportion to the share of power, which the people possess. In the most despotic countries, you will find the prince watching with restless solicitude for the good of his people, choosing the wisest ministers, establishing the most useful laws, fostering sciences, arts, agriculture, manufactures, and commerce; and, with true parental affection, like the father of a family, devoting his cares, his labours, and his life, to the welfare and happiness of his people. And you will see the people in republics agitated with every violent and malignant passion; slaves to their vices, selling the public interests for money or pleasure, destroying each other, hating and opposing the laws, prostituting their rights to corruption and flattery; reviling good men, and conferring authority on the base and the ignorant. I shall not go to France for examples. Let us only review our own conduct, and see whether it be regulated by a regard for the public good; whether we do not often abuse the power we possess; whether we do not encourage selfish, slanderous, and malevolent passions; whether we do not condemn authority, and whether we do not hate and oppose wise and good men, and exalt the foolish, the ignorant, and the flattering.

If this be the case, it may be much doubted, whether it be the interest of any nation, whatever be the form of its government, if the administration be generally useful, to encounter the hazards of a revolution, for the sake of introducing equality, or any other of the fanciful rights of man: since all must depend on the administration, and the chance for a good administration seems little, if at all, improved by any abstract principles. These are indeed noble principles, and flattering to humanity; but still they are abstract; they are adapted to a state of man

which has no existence, a state of universal knowledge, wisdom, and virtue; and, like every theory not founded on truth, must be delusive. Equality of power ought only to exist, where there is equality of mind. There it may be proper, be the qualities of mind good or bad. It may be a fit basis, therefore, of a government for angels or devils, though not for the varied character of the human mind. June Sess.
1798.

Let us therefore beware of supposing, that equality is a complete security of true practical liberty, or useful laws. And let us not think, that, where equality does not exist, the people are, therefore, not free. Among a wise and virtuous people, equality will doubtless produce liberty or useful laws. But wisdom and virtue in the administration of any form of government will do the same thing. And whatever be the form of government, if the laws be useful, if social and domestic happiness be promoted, if the rights of person, property, and opinion be secured, there is liberty. If such laws be not made, such happiness be not promoted, and such rights be not secured, whatever be the form of the government, there is no true liberty, there is slavery; and it is not less grievous, and it is more disgraceful, if this slavery proceed from our own passions, than if it proceeded from the form of our government.

Let us abandon this method of learning the science of government from abstract principles, and artificial systems. Nothing but error and delusion can be expected from a study of this kind. If we would be wise, in this, as in any other science, we must learn from experience. Experiment is the only road to true knowledge. Study the nature of the human mind, passions, and conduct.—Consult history and the records of experiment, and discard systems and theories.

Let us now proceed, with diligence and attention, to a conscientious discharge of our present duties, and shew, by an intelligent and faithful exercise of our authority, that we deserve to possess it.

The peace of the community requires, that all riot, tumult, and indecency should be discountenanced, suppressed, and punished.* Without the authority of go-

*This and all that follows, was delivered only at Washington, where the court was held on the last Monday of May 1798.

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vernment to do this, men would degenerate to ruffians and savages. If any acts of this nature appear, it behooves magistrates, juries, and courts, instantly to apply their authority of coercion. If they happen in the night, when all quiet and orderly people are presumed to be enjoying the refreshment of sleep, to qualify themselves for the daily labours of honest and useful industry ; it is more peculiarly incumbent on all persons vested with public authority, to exert their power for the restoration and preservation of peace, not only by removing the disturbance, but by bringing the offenders to punishment, as an example to deter from future offences. All such acts of violence done in a town become greater offences, in proportion to the number of peaceable citizens whom they molest. Government is bound to protect all orderly citizens, in the full enjoyment of peace and quiet. If such acts be done in a county town, at the seat of justice, it is an additional aggravation : for, under the immediate eye of public authority, peculiar decency and respect for the laws ought to prevail.

A disgraceful and disorderly breach of the peace was committed in this town, in the dead of night, between the last day of April and the first day of this month of May. A number of persons assembled about midnight, and between that and two of the clock in the morning, with great noise and tumult, to the disturbance of the neighbourhood, erected, in the street, a pole, which they called a may-pole, hung to it colours, and to them the French flag. To erect a pole in a street or high-way, at any time, is an offence, it is a public nuisance. To erect such pole, even on private ground, in a town, in the dead of night, with noise, and tumult disturbing the neighbourhood, is an offence, it is a public nuisance.— And for citizens of America, at this time, to hang to such pole, the flag of a nation, which, contrary to all the rights of nature and nations, and to solemn treaties, has long been carrying on a cruel, oppressive, and flagitious war against us, shows such a total want of all duty and allegiance to our country, and such an abandoned spirit of seditious and treasonable subjection to the will of a foreign and hostile government, as ought to excite the detestation of all good men, and lovers of their country.

On the same night, and at the hour of two of the clock in the morning, and from that to day light, some of the same party paraded through the streets of this town, beating a drum, and playing a fife, to the disturbance and alarm of the inhabitants. This is an offence, it is a public nuisance, as tending to excite alarm, and to deprive peaceable citizens of that seasonable repose, and quiet sleep, of which the laws engage to protect them in the enjoyment. To prevent great evils, you must prevent the least beginnings: for people naturally begin with little, and proceed from bad to worse.

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1798.

Nothing is more certain, than that the greatest enemy to liberty is licentiousness, and that the surest way to destroy our privileges is to abuse them. Liberty of the press has always been considered as an important right; but, if it be abused, if it degenerate into licentiousness, the abuse must be corrected, if we would preserve the true liberty of the press. Printing is an useful art, and newspapers are important means of information. But if printers publish falsehood, indecency, or profaneness, they poison society, corrupt morals, and undermine religion. Nothing is more dangerous and detestable, than such printers and newspapers. They are public nuisances. Such newspapers ought to be rejected, and such printers punished.

In all calamity, the pious man looks up to God.— And in all national calamity, pious rulers have constantly directed the minds of their people to God, and, for this end, have proclaimed days of fasting and humiliation. In the present alarming crisis, the president of the United States recommended a day of fasting and humiliation. In a newspaper published in this town, there was printed "*A prayer for John Adams on the fast day.*" This paper, called a prayer, represented the president of the United States as offering to the Almighty confessions and petitions of a ridiculous nature. When a man noted for piety and virtue is thus represented in a ridiculous light, as mocking God, the representation is an offence, a libel. When the man thus represented is a magistrate, and, much more, the chief magistrate, it becomes a seditious libel, dangerous to the just influence of public authority. When the object of this is to turn into ridicule a solemn act of religious duty; it becomes an

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1798. } impious libel. And, if it represent God as listening to mock confessions and petitions; it becomes a blasphemous libel. And, if those, whose duty it is to correct such enormities, do not discharge this duty, they give their countenance to scandal, sedition, impiety, and blasphemy.

Having discharged my duty, in the mention of these things, I leave them to your serious and conscientious consideration.

No. XXV.

Liberty of Speech and of the Press.

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1798. } **I**T is of the utmost importance to a free people, that the just limits of their rights be well ascertained and preserved: for liberty without limit is licentiousness; and licentiousness is the worst kind of tyranny, a tyranny of all. To preserve ourselves against this, and maintain true liberty, a line must be drawn between the rights of each, so well marked, as that it be known by all, and so well guarded, as that it cannot be passed by any with impunity. Thus every man will be free; for every man may exercise his rights to the extent of their just limits, and no man can go beyond those limits, and encroach on the rights of others. My right to enjoy implies, that no man shall disturb my enjoyment. And it is no restraint on my liberty, that in the exercise of my rights, I am restrained from infringing the rights of others. The rule is, *So use your own rights, as not to injure those of others.* Invasion of the rights of others is tyranny; and if this invasion may be made by every one, it is tyranny of the worst kind, for, in proportion to the number of oppressors, will be the desire and opportunity of oppression. The true friend of liberty, therefore, is he, who will set such strong limits round the

rights of every man, that, in the exercise of them, no man can interrupt the rights of any other. And they are not friends of liberty, but promoters of licentiousness, tyranny and oppression, who contend, that every man ought to have an unlimited exercise of his own rights, without any regard to the rights of others. I can have no right to injure the rights of another; and if I claim this, I am a tyrant and oppressor.

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Reputation, character, good name or opinion, is a kind of property or possession, which every man who has honestly acquired it, has a right to enjoy.* Like any other possession or property, it cannot be taken away from us, but by our own acts. The man who invades the reputation invades the rights of another. And not only individuals, but more especially men in public station, branches or departments of the government, the whole administration, and the principles, constitution or system of government, and the principles or system of public religion and morals, have a right, for the sake of the benefits we receive from them, to reputation, good name or opinion, and the invasion of the reputation of either of those is an invasion of right, a lessening of our comfort, and motives to duty.

But man is endued with faculties of communicating sentiments, of investigating principles, and of forming opinions and judgments. The exercise of those faculties is a source of pleasure and instruction. A knowledge, and a just judgment of principles, of facts, and of characters may be useful for the improvement of our minds, and the regulation of our conduct. The exercise of those faculties, of opinion, reasoning, judgment, and communication, is part of our natural rights.† But the principles of liberty require, that this right, like all our other rights, be limited, so that it never infringe the right of reputation. It must not represent a solemn truth or exercise of religion, as false or ridiculous, an established and useful principle or form of our government, as odious and detestable; a regular and salutary act or motive of the administration, as unlawful, pernicious, or dishonest; or an upright man, as corrupt. For this would be exercising our right of opinion or com-

* *Penn. Const. Art. 9, sect. 11* † *P. C. Art. 9, sect. 7.*

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munication so as to infringe the right of reputation, and be violating the principles of liberty and natural right.

The principles of liberty, therefore, the rights of man, require, that our right of communicating information, as to facts and opinions, be so restrained, as not to infringe the right of reputation. Unless it be so restrained, there is no liberty; for there is no just enjoyment of our rights. And, if every man's right of communication be unrestrained, every man's right of reputation is unguarded; and there is, in this respect, universal licentiousness, and each man is at the mercy of every man, the most precarious and oppressive of all states.— Therefore the freest governments, which have the most regarded and cultivated the principles of liberty, as they have so described and limited other rights, that none should infringe any other, have been careful so to define and limit the rights of reputation and of communication of sentiments, that the right of either should not infringe that of the other.

We communicate our sentiments by words, spoken, written, or printed, or by pictures or other signs. The restraints laid on the exercise of this right, so as it may not infringe the right of reputation, differ, according to the way in which the right of communication is exercised. If the right of reputation of a private citizen be infringed by words spoken, no indictment will lie for this injury, which is only a ground for a civil action, to recover damages. “*In foro conscientiae*,” says a learned author, at the tribunal of conscience, “it is no excuse, that the slanderous words are true; for, if a man have been guilty of any thing, which the law prohibits, he is liable to answer for it, in a legal way; but it can answer no good purpose for a private person to accuse him thereof; there is a degree of cruelty in so doing, and it must create ill blood. Yet the law does, in compassion to man's infirmities, allow it to be a justification, in an action for words spoken, that they are true.”* But when slanderous words are spoken of the constitution, or administration, or any of its acts or officers, they are ground for an indictment, as a misdemeanor, or breach of the duty of a citizen.† The reason of this is evident:

* 4 Bat. Abr. 480.

† *Ib.*

for, as for an injury affecting an individual, the remedy is by action, so for an injury affecting the public, the remedy is by indictment. *Sept. Sess. 1798.*

With respect to libels, or slander expressed by words written or printed, or by pictures or other signs, and infringing the right of reputation; "they have," says the same author, "at all times, and with good reason, been punished in a more exemplary manner than slanderous words: for having a greater tendency to provoke men to breaches of the peace, quarrels and murders, they are of much more dangerous consequence to society.— Words, which are frequently the effect of a sudden gust of passion, may soon be buried in oblivion. But libels, besides that the author is actuated by more deliberate malice, are, for the most part, so lasting, as to be scarce ever forgiven."* For this reason, a libel, affecting the reputation of even a private citizen, is restrained, by being considered as a public offence, and subject to an indictment. But whether, on the trial of such indictment, the truth of the libel may be given in evidence, will depend on the nature of the libel.

Justice Blackstone defines libels, "taken in their largest sense, to be writings, pictures or the like, of an immoral or illegal tendency, and, in a more particular sense, any malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule. It is immaterial, with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally. Therefore, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers."†

The constitution of our state provides, "that the printing presses shall be free to every person, who undertakes to examine the proceedings of the legislature, or any branch of government; and no law shall ever be made to restrain the right thereof. The free commu-

* 4 *Bac. Abr.* 480.

† 4 *Comm.* 150—1.

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Communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print, on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.*

From this statement of the law respecting libels, the following deductions seem evident:—

1. This right, of free communication of thoughts and opinions, is, like all other rights, limited by responsibility for its abuse; and laws to punish its abuse, are not, in a constitutional or just sense, restraints on the liberty of the press.

2. The general rule is, that, in indictments for libels, truth cannot be given in evidence.

3. This general rule is excluded only from the cases mentioned in this section of the constitution, and remains applicable to all other cases.

4. It is only in so far as the paper charged as a libel investigates the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, that the truth thereof can be given in evidence. In all other cases, truth is no justification; for it is the provocation which constitutes the offence.

5. As grand juries hear evidence only in behalf of the prosecution, and, in indictments for libels, as in other cases, the jury determine the law and the facts, under the direction of the court, (that is, conforming to this direction in point of law, have a right to give a general verdict) the grand jury, generally speaking, cannot ascertain whether the libellous matter be true or not; but, if the making or publishing of the libel be proved, they will find the bill; and, on the trial before the traverse jury, the court will direct, whether evidence of the truth be admissible or not, and whether the matter

* *Const. Art. 9, § 2. 7.*

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be libellous or not; and, under the direction of the court, the traverse jury will determine the law and the facts. If a traverse jury should determine, that a paper is a libel, which is not, and convict a man, who has committed no offence, the court has a controul over their verdict, by granting a new trial, or arresting judgment. But if the jury determine that a libel is no libel and acquit a man really guilty of an offence, the court has no controul over this verdict: for a man acquitted of a criminal charge, can never be tried again on the same charge.

Such seems to be the state of the right of communication of thoughts and opinions, according to the law of Pennsylvania. Any thing may be spoken, in terms of decency proper to the subject, of the government, an officer, or an individual, provided the speaker can prove it to be true. But all truths are not useful or proper for publication, therefore all truths are not to be written, printed, and so uttered or published. And therefore, except in the case of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, if any man write, print, utter, or publish, a libel, he may be indicted, convicted, and punished, whether the libellous matter be true or not.

Congress, in its last session, has passed a law,* enacting, that, if any persons shall unlawfully combine together, with intent to oppose any measure of the government of the United States, or impede the operation of any law of the United States, or to prevent any person holding any office under the government of the United States from performing his duty; or shall, with such intent, advise, or attempt to procure, any insurrection, riot, unlawful assembly or combination; they shall be deemed guilty of a high misdemeanor, and be punished by a fine, not exceeding five thousand dollars, and by imprisonment, for not less than six months, nor more than five years; and may, further, be holden to sureties for good behaviour. And it further enacts, that if any person shall write, print, utter, or publish, or shall cause

* 14th July, 1798.

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1798.  or procure to be written, printed, uttered, or published, or shall knowingly and willingly aid in writing, printing, uttering or publishing, any false, scandalous, and malicious writing, against the government of the United States, or either house of congress, or the president of the United States, with intent to defame the said government, or either house of congress, or the president; or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the people of the United States; or to excite unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the president of the United States, done in pursuance of any such law, or of the powers vested in him by the constitution of the United States; or to oppose or defeat any such law or act; or to aid, encourage, or abet, any hostile designs of any foreign nation against the United States, their people or government; such person shall be punished by a fine, not exceeding two thousand dollars, and imprisonment, not exceeding two years.

This act, which seems to be best known by the name of *the sedition act*, provides, "that, if any person shall be prosecuted under it, for writing or publishing any libel, it shall be lawful for him, on the trial of the cause, to give in evidence, in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases." This clause, clearly borrowed from the section already quoted of the constitution of Pennsylvania, confirms, so far as concurrent expressions of different persons on the same subject can, the construction which I put on that section, that the time for giving in evidence the truth of the libellous matter is at the trial of the cause by the traverse jury.

No law seems to have been resisted in congress with more vehemence and passion, by those who opposed all the measures adopted, as measures of defence against the hostile spirit of France. And, out of doors, it has been attacked with sullen rancour, as a death wound to the progress of that detestable system of slander, which has been pursued with such malignant industry, and calamitous success, against every measure of the administration.

And yet, strange as it may seem, this law does not create any new offence; for every thing forbidden by it appears to me to have been, before, an offence at common law. The combinations and attempts therein forbidden are misdemeanors. Any writing of an immoral or illegal tendency is a libel.* And slanderous words spoken of the government, or its acts or authority, are punishable by indictment.†

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It may be said, then, why was this law made? Several reasons may be given for it.

1. It is no uncommon thing for a legislature to make an act declaratory of the common law. At this time, it was peculiarly proper to make such an act, as a solemn admonition to wicked or unthinking men, to abstain from practices, which spread slanders and falsehood, foment divisions and seditions among the citizens, weaken the energy of the government, and thus rendering the nation defenceless, encourage France, by a prospect of impunity and success, to measures of aggression and hostility.

2. A doubt had been suggested whether the courts of the United States had cognizance of any offences not expressly declared by the constitution, or some law or treaty of the United States. I do not think this doubt well founded. It has been supported by an assertion, that the judiciary of the United States has no *common law* jurisdiction: and this assertion has been triumphantly displayed in a variety of shapes, and propped up by a variety of illustrations. Yet, in my opinion, it is delusive, and founded on a misconception of ideas, and misconstruction and abuse of words. There is a *common law* jurisdiction incident to every man, to every state of society, and to every organization of civil government; a power necessary for self-preservation. A jurisdiction, to correct offences against individuals or society within it, or against its own safety, is, by *common law*, incident to the judiciary of each state. And a jurisdiction, to correct offences against the safety of the United States, is, by *common law*, incident to the judiciary of the United States. The judicial power of the United States extends to all cases arising under the constitution, the laws and

* 4 Comm. 150.

† 4 Bac. Abr. 480.

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3. It might be thought proper to pass this law, in order to limit the extent of punishment which might be inflicted on the offender; and to give him the advantage of proving the truth of the libel in his defence.

Whatever might have been the motive for making this law, it was opposed on two grounds: 1, As unconstitutional; and, 2, as inexpedient.

1. It was said to be unconstitutional, because the constitution declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;"† and more expressly, that "congress shall make no law abridging the freedom of speech or of the press."‡

The constitution, like every other instrument, must be construed, by taking the whole together. Among the powers which the constitution delegates to congress, is a power "to make all laws, which shall be necessary and proper for carrying into execution all powers vested by this constitution in the government of the United States, or any department or office thereof."§ It is evident, that the attempts and writings, declared punishable by this law, have a direct tendency, differing only in degree from force, to prevent or obstruct the execution of the powers vested by the constitution in the government of the United States. Therefore a law, declaring that such attempts and writings are punishable, is constitutional, as necessary and proper for the execution of the powers of government.

If the clause of the constitution which prohibits congress from making any law abridging the freedom of

* *Const. art. 3, sect. 2.* † *U. S. Const. add. art. 12.*
‡ *Ib. art. 3.* § *U. S. Const. art 1, sect. 8.*

speech or of the press, is to be construed as prohibiting congress from making any law declaring libels against the government, acts, or measures of the United States, to be punishable; then, by the same construction of the constitution of Pennsylvania, which declares, that no law shall ever be made to restrain this right, the most false and malicious libels might be published, against the government, acts, or measures of this state, (and of course of the United States) and the assembly would have no power to make any law, declaring such libels punishable; and thus absolute impunity for them would be established. This is a construction too absurd to be received as true. Nor will it justify such construction of the constitution of the United States, to say, that it was intended by that constitution, that the authority of passing laws against libels should be left to the individual states: for this would be supposing that the government of the United States must, unless the individual states choose to afford it, be without defence against the most dangerous enemy that can attack it, slander; against which, if unrestrained, no government can support itself. This, therefore, would only remove one absurdity by another, and some other construction of this clause of the constitution must be sought for.

When the press was abused by being made a vehicle of slander, governments laid restraints on it. Books were to be printed only in certain places, only of a certain nature, and only by licence of certain persons. In England, these restrictions were imposed first by the authority of the king, part of whose prerogative the regulation of printing was considered; then by the star chamber, an organ of executive authority; and in the time of the commonwealth, and after the restoration, and after the revolution, by the parliament. The law restraining the liberty of the press, expiring in 1794, was not renewed, and the press became free.* For freedom of the press consists in this, that any man may, without the consent of any other, print any book or writing whatever, being, in this, as in all other freedom of action, liable to punishment, if he injure an individual or the public.

* *Hume's Eng. app. James I, vol. 4, p. 318. 4Comm. 151-2.*

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For thus understanding the liberty of the press, I shall quote the respectable authority of Sir William Blackstone. "Where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished, the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state:—but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish any dangerous or offensive writing, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundation of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the subject of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And the only plausible argument heretofore used, for the restraining of the freedom of the press, *that it was necessary to prevent the daily abuse of it*, will entirely loose its force, when it is shewn (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose, without incurring a suitable punishment. So true will it be found, that to censure the licentiousness, is to maintain the liberty of the press."*

Such is the liberty of the press, which the people of *Sept. Sess.*
the States of America, for its greater security, have *1798.*
made part of their fundamental law. In their state
constitutions, they provided, that their legislatures should
not make any law restraining the liberty of the press,
that is, should lay no *previous* restraints on the press; or,
as the Pennsylvania constitution expresses it, that "every
citizen may freely speak, write, and print, on any sub-
ject, *being responsible for the abuse of that liberty.*"*

The same principle was afterwards adopted into the
federal constitution; and the section establishing it
there is to be construed in the same manner. So that
the liberty of the press is precisely as stated by Sir Wil-
liam Blackstone, its being free from all previous restraint,
but, as all other rights or liberties are, subject to cor-
rection for its abuse. On this liberty of the press in
England, parliament may, at any time, impose previous
restraints; but here a constitutional provision puts it
out of the power of any legislature to do so.

This law then is no abridgment of the freedom of
speech or of the press, and is therefore no infringement
of the constitution. So far is it from this, that, as it
makes no new offence, it is no alteration of the criminal
code, only as it enlarges the bounds of defence, limits
the punishment, and (if this be an alteration) gives ex-
press jurisdiction to the federal courts. It is not inju-
rious either to the constitution, or to the liberty of the
press, but is intended and adapted for the support of both;
for, it cannot be too often repeated, "to censure the li-
centiousness is to maintain the liberty of the press."

To restrain the abuse of my right, or such an exercise
of it as shall encroach on a right of another, is no restraint
or abridgment of my right: for I can have no right to
lessen the right of another. And to claim such an un-
limited use of my right, as to encroach on the right of
another, is to claim, not liberty, but tyranny; not right,
but oppression. "I may freely speak, write, and print,
on any subject;" but "I am responsible for the abuse
of this liberty." Unless I may speak, write, and print,
my right will not be sufficiently secured; and unless I
be responsible for the abuse of this liberty, the rights of

* *Art. 9, sect. 7.*

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others would not be sufficiently secured. Therefore, to secure all, and establish true liberty, I must be free to speak, write, and print, but be also responsible for the abuse of that liberty. This is a sound principle, and applies to all rights whatever. It applies to our right of action, as well as to our expressing our sentiments in every way. I may ride a horse, but I must not ride over a man. I may walk where I please, but not on my neighbour's garden. I may use my cane, but not to strike any man I meet. Such is the liberty of speech or of the press. A law that any printing press should be locked up, and the key kept by a certain officer, or that no book should be printed without permission from a certain officer, would be a law abridging the liberty of the press. A law, that a man should not speak without permission, should speak only on certain subjects, or should have a gag put in his mouth, not to be taken out but by certain officer, would be an abridgment of the freedom of speech, would be indeed a *gagging law*.* But because the constitution denies the legislature any power to make a law like this, or to make any law laying a *previous* restraint on speech or the press, to claim therefore a right, from the constitution, to speak, write, or print, sedition, impiety, blasphemy, or any falsehood, however gross, indecent, and dangerous, is claiming, not liberty, but licentiousness. Will any one say, that my right of freedom of speech intitles me to propagate with impunity any slander I please, upon all my neighbours? What character would be safe, and what life would be free from misery, were this liberty of speech to be indulged? There is no such liberty. A liberty to destroy reputation would be as unjust as a liberty to destroy life. Every man is free to speak, but he speaks at his peril, and is answerable for all he says, if it tend to the injury of another. It is not his opinion of its being proper or true, that will justify him. When he utters it, he is answerable for its truth and propriety; and the opinion of a court and jury, not his opinion, must decide on its truth and propriety. Every repeater of the tale is, in like manner, answerable as the author. So of libels, or written or printed slander, with this dif-

* This expression has been applied to the sedition law.

ference, that, as the provocation by them is more dangerous, they are less indulged; and, except in the case of matters proper for public information, the proceedings of government, and the official conduct of officers, or men in a public capacity, truth is no justification. Even in cases where truth is a justification, the truth must be made out to the satisfaction of a jury. That the libeller may have thought it true, though it may extenuate, will not justify the offence: for no man is to be judge in his own cause, and my opinion will not justify me in doing an injury to my neighbour, in his reputation, any more than in his person or property. Every man, therefore, writes and prints, as he speaks, at his peril; and the publisher of a libel is answerable, in like manner as the author. And both are answerable, as in any other offence, to the judgment of a court and jury, by whose opinion, and not of the offender, must the guilt or innocence of the action be determined. And such restriction, if I may so call it, or correction of the abuse, of freedom of speech and of the press, is not only perfectly consistent with the principles of civil liberty in general, and with the rules of our constitution; but is necessary for our maintaining the genuine liberty of speech and the press. For, of all enemies to liberty, licentiousness is the greatest.

2. I think, the expediency of this law can be as clearly shown, as its constitutionality: and, if so, there will be not only duty, but pleasure in the obedience we yield to it.

Speech, writing, and printing, are the great directors of public opinion, and public opinion is the great director of human action. Of such force is public opinion, that, with it on its side, the worst government will support itself; and, with it against it, the best government will fall. All governments are supported by it; and, without it, can no government be supported. What is the force in the power of any government, compared to that of the people governed by it, if the people choose to resist? And will they not choose to resist, if their opinions be set against the government, their passions roused to enthusiasm, and an opportunity offered for success? And all this may be done by means of clubs, societies, and the press. Give to any set of men the

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command of the press, and you give them the command of the country ; for you give them the command of public opinion, which commands every thing. Let, therefore, clubs, societies, and the printing presses, attack any government, however free, and however strong, they will infallibly destroy it.

It will not be pretended, that the old government of France was good, nor denied, that it needed reformation ; but, in so far as it possessed strength, and as it was supported by the prejudices of the people in its favour, it is a proper instance of what I have stated. The French revolution was accomplished by a gradual operation on public opinion. For many years before, the seeds of insurrection had been busily sown in the minds of the people. Clubs and societies, under various names and pretexts, were established through the kingdom.—The printing presses were occupied. Pamphlets and books were dispersed. New principles were broached, supported, and established. Under the sanction of philosophy and reason, all prejudices in favour of religion and government were gradually sapped, to make way for *liberty, equality and the rights of man* ; fine words, which, as they were little understood, were the more admired. All were men ; and priests and princes were no more. All respect for office ceased : and an insult to a bishop or a king was no more than an insult to an equal. Religion was but a state trick, and its author and ministers but impostors. Public opinion, the great pillar of this, as of any other government, being thus withdrawn, the mighty fabric of the monarchy, which, supported by public opinion, had stood the blasts of ages, was touched by a slight shock, and, in a moment, crumbled to pieces.

What was the consequence ? Not satisfied with reformation, public opinion, directed by clubs, was employed to lead the nation to excess, anarchy, and slavery. The desperate succession of tyrants, which hath since ruled France was supported by public opinion, directed by clubs and the press, till it acquired an enormous armed force. When disgusted by its cruel and unprincipled oppression, public opinion began to revolt, and the printing presses to speak against it ; even this tyranny, with its vast armed force, felt that it could not

resist public opinion, and, to silence it, shut up the presses; and now extorts, from an unhappy nation, a sullen and reluctant submission, by its armed force, and an enslaved press. *Sess. Sess.*
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The same seeds of dissolution were sown in most of the governments of Europe, by the corruption of public opinion, effected by a combination of clubs and the press. Many have fallen sacrifices. And nothing but the dreadful example, which the French revolution furnished, of the fatal danger of substituting abstract principles instead of the maxims of experience, could have preserved many other governments.

One would have thought, that the United States of America, blest with the best practicable mode of republican liberty, which human wisdom hath yet been able to suggest, would have escaped this greatest of all plagues, the corruption of public opinion; and that all men would have united in approbation of a system of government, which must be acknowledged excellent, and of an administration, which must be acknowledged to have been wise, enlightened, and honest. Yet, unfortunately, this plague hath reached us also; and our government has been assailed with the grossest slanders, by many who perhaps believed, and by many who surely could not believe, the slanders which they uttered. The tongue, the pen, and the press; conversations, letters, essays, and pamphlets, have represented our truly republican and balanced constitution, as a system of tyranny; and our upright and wise administration; as mischievous and corrupt. Our wisest and best public officers have had their lives embittered, and have been driven from their stations, by unceasing and malignant slander. And thus has it been attempted to withdraw, from our excellent government, the only effectual support of any government, public opinion; and thus to withdraw all reverence from station and authority, deprive the constitution, the laws, and the administration, of all respect and efficacy, and surrender the nation a prey to any invader.

France saw our condition, and attacked us: For France attacks a nation only when she has rendered it defenceless, by dividing the people from the government, and withdrawing from the government the support of

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public opinion. In this condition, any nation is an easy prey. To our complaints she pretended no justification, and replied to our resentment, that she had a party among ourselves. She rested on the influence of clubs and the press, and on the devotion to her, which they had produced among us. Some of our presses seem to have been constantly devoted to her views. Many of our citizens, and of our men in public stations seem to have favoured those measures, on which France must have depended for success against us. And our government was threatened with the loss of its best support, the hearts of its citizens, by means of falsehood, misrepresentation, and the vile arts of foreign enemies, and discontented, factious, and seditious men. In this situation, in which no government can long stand, and threatened with avowed war from France, was it not the duty of our government, to disarm France of that weapon, by which she could most effectually injure us, the power of spreading slander and sedition against the government, and alienating from it, its true support, the affections of its citizens? It was its duty, and it would have been inexcusable, if it had omitted this duty. Without suppressing slander and sedition against the government, the support of public opinion cannot be preserved to it; and without the support to it of public opinion, all other defence against France is vain.

On these grounds, it appears evident to me, that this law is not only expedient, but necessary. And it may be laid down as a general rule, that it will be impossible to prevent the general corruption of public opinion, or to preserve any government against it; unless there be laws to correct the licentiousness of speech and of the press. True liberty of speech and of the press consists in being free to speak, write, and print, but being, as in the exercise of all our other liberties, responsible for the abuse of this liberty. And whether we have abused this liberty or not, must, like all other questions of right, be left to the decision of a court and a jury. This is the universal test, by which the exercise of all our rights must be tried. Nor is the subjection of our right of freedom of speech and of the press to this test, any more a restraint on that right; than the subjection of our rights of life and of property to the same test, is

a restraint on those rights. By this test must the exercise of all our rights be tried, or no man could enjoy any right whatever. If, while our right to life and to property is submitted to this restriction, we yet believe we are free, shall we think our liberty infringed, by subjecting, to the same restriction, our right to speak and print?

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This law takes from no man any liberty, but a liberty of doing mischief. And, so far is it from being true, that this law is any violation of liberty, that, it may be safely averred, without such laws, for punishing the abuse of the freedom of speech and of the press, liberty cannot be preserved: every man will be a slave to the malignant passions of every other; truth and justice will be banished, the authority of government destroyed, and malice, anarchy, confusion, and every evil work established.

Our constitution is excellent, our administration is wise and honest, and has no interest separate from that of the people. On the support of such an administration of such a government depends our liberty. But, let me repeat, no administration or government can stand against the corruption of public opinion; and let me, therefore, solemnly admonish you, as you value the peace and liberty of yourselves and your posterity, seriously to reflect on the truth of this. We have seen an insurrection promoted by the corruption of public opinion. An invasion is invited by it. How many shocks of this kind our government is doomed to stand, only the Ruler of the world knows. Let us take warning from our own experience, and the fate of other nations. Let all friends to liberty and order unite in suppressing slander: for, where it prevails, there will be no happiness, no government. Of all slanders those of the press are most dangerous. Presses established to run down the government are the most destructive of all treasons. This ought to be well considered; for every one who encourages such presses, or contributes to their support, is a partner in their guilt. Every one, who reads their productions with approbation, sucks in disease upon his mind; and every one, who repeats them to others, spreads the infection. What would we think of a set of men, who should agree to hire a number of persons to

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run through the country, and report falsehoods and flanders? Precisely such, and more dangerous, is the guilt of those, who contribute to the support of a slanderous press. They are wounding their own and their country's peace, and undermining the government.

But you will say, *We desire to hear both sides, that we may know the truth.* My friends, truth has but one side: and listening to error and falsehood is indeed a strange way to discover truth. Take the representations which its friends have made of the conduct of government; have ye ever found falsehood in them? Take the contradictory statements made by its enemies; have ye ever found truth in them?

You may yet say, *We have not the means of knowing on which side the truth lies; and we, therefore, give no preference to any, but hear all.* What would ye think of a Protestant who should say thus? *The Lutherans and Calvinists differ in opinion, the Catholics differ from both, and the Mahometans from them all; I know not on which side the truth is; I will therefore, pay a lutheran minister, a calvanist minister, a catholic priest, and a turkish iman; and then I shall be sure of knowing the truth.*—Would ye think, that this man had any regard to truth or religion? Instead of acquiring knowledge, would he not confuse his mind, and lose sight of both truth and duty? As in religion so in government, a sincere enquirer after truth will always find means of discovering it. And it is only their enemies, and hypocritical pretenders to sincerity, who, under pretence of searching for truth, wander through the endless varieties of error, and affect to think there is no certainty.

There is hardly any part of government, which, as of religion, has not been misrepresented by its enemies. Now, though of all its parts, the people generally have not had an opportunity of being fully satisfied, yet of some, they have had this opportunity. And, wherever they have had such opportunity, they must be satisfied, that the conduct of government has been right, and the misrepresentations of it false and malicious. No part of the conduct of our government has been more misrepresented, than its conduct with respect to France. Yet, when fairly stated, in a way that the greatest slanderers dare not contradict, how honest, wise, and praise-worthy

does it seem ! Ought we not, therefore, to believe, that, if we understood all the rest, as well as this part, the whole would appear as unexceptionable ? This would be our duty between man and man ; and it is also our duty, as between citizens and the government.

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Another duty, and a mean of information, is to search at the best sources of information. You ought never to believe a slander on government, merely because it is stated in a newspaper, or a pamphlet, or reported by those, in whose judgment, veracity, and opportunity of knowing, you have not confidence. As if the thing concerned your own house or estate, or the character of your friend, go to those, in whose veracity and judgment, you would confide in matters of the greatest importance. For, be assured, no matter is of greater importance, than a just confidence in government. The men, who endeavour to rob you of this, are the worst enemies of your peace. If they can succeed in robbing your minds of this confidence, they rob you of your liberty ; for they deprive government of its authority ; and government without authority, is anarchy ; and anarchy is the worst tyranny. No crime, therefore, is greater, than that slander, which diminishing the people's confidence in the government, diminishes their security, and destroys their liberty. And no crime more deserves the vigilant and severe animadversion of a grand jury.

No. XXVI.

A Defence of the Alien Act.

IN circumstances of extraordinary danger or alarm, extraordinary measures must be adopted : for ordinary means are incompetent for extraordinary occasions. Though I may not kill a man, while I am in no danger from him ; yet if he be in the act to kill me, or I find him breaking into my house, in the night time, to rob me, I may put him to death. This results from the

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Dec. Sess. 1798. general law of self-defence. The right of property will not forbid us, when a house is on fire, to pull down the adjacent buildings, to save the rest of the town. Nor will the right of personal liberty restrain the magistrate, from committing to gaol a man who has not actually done mischief, if another is justly afraid of mischief being done by him. All these are extraordinary cases, to which the ordinary rules of property, or of personal liberty and safety are not applicable: and the violation of those rules, in such cases, is, in true construction no violation of them: for they were never meant to be applied to such cases, but only to the ordinary and peaceful state of society, and must yield to the great law of self-preservation and common welfare.

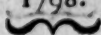
Nations, like individuals, are also bound, by the law of self-preservation, in times of danger, to adopt measures, which would be altogether unjustifiable in ordinary times. They may destroy an hostile army. If an hostile army be suffered to march through a neutral country, to attack another nation, this nation may also enter that country, and oppose its enemy. If fields, gardens, houses, or towns, shelter its enemy from the full force of attack, they may be destroyed. If it be necessary to weaken the enemy by want, the corn, cattle, and all kinds of provisions may be carried off, and the frontier made, as it were, a desert. Such things are, in times of danger, justifiable by the law of self-defence; though, in ordinary times, they would be unlawful and inhuman. On the same principles of self-defence, to prevent a dangerous communication of intelligence, or any measure unfavourable to its safety, when a nation is, or is likely to be, engaged in war, it may order any aliens, who may be suspected of promoting or favouring the designs of its enemy, to depart out of its territory. This may be always, and has been generally done. And, unless where this right is regulated by treaty, this may be done, at the discretion of the government under which the aliens reside. For every government must be sole judge of what is necessary to be done, for its own safety or advantage, within its own territory.* And, even with respect to their own subjects, most governments

* *Vattel, L. of N. Prel. sect. 17, 20, B. 2, sect. 94.*

have reserved a right, without being required to shew any cause, to commit to close custody any subject suspected as dangerous to the peace or welfare of the community. In England, this right is restrained by the writ of *habeas corpus*, which gives to every subject imprisoned an opportunity of requiring the cause of his commitment, and of obtaining, in all proper cases, his enlargement. When, therefore, the king of Britain's ministers find it necessary, for political reasons, to restrain the personal liberty of any subject, without shewing any cause for it, a law must be obtained from parliament, suspending the privilege of the writ of *habeas corpus*; and parliament, may, whenever it pleases, pass such a law.

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Conforming to the principles of liberty inherited from our ancestors, the privilege of the writ of *habeas corpus* is established, as a principle, in the government of this state and of the Union.* And, though congress or the general assembly may, respectively, like the British parliament, by law, suspend this privilege; yet they cannot, like the British parliament, pass such law whenever they please. For the federal and state constitutions have declared, that "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." So that, in this country, no citizen can be deprived of his liberty, without an avowed and sufficient cause, unless, in case of rebellion or invasion, the legislature think the public safety requires it, and suspend the privilege of the writ of *habeas corpus*. But here the constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations, or of the particular provisions of treaties made between the United States, and the government whose subjects or citizens the aliens severally are.

Congress, in its last session, found the United States in extraordinary circumstances of peril, unequalled since their independence was solemnly acknowledged. France, having, without any respect to the principles of liberty,

* U. S. Const. Art. 1, sect. 8. Penn. Const. Art. 9, sect. 14.

1 U. S. L. 101. 2 St. L. 241.

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the law of nations, or the rights of individuals, plundered the land to the utmost reach of her grasp ; extended the same unprincipled rapacity to the ocean, and plundered indiscriminately friends and foes. Of all nations and governments, none had with more affection regarded the revolution of France, none had more assiduously cultivated her friendship, none had more scrupulously observed the rules of neutrality, or, consistently with those rules, partially indulged the views of France ; than the nation and government of the United States. And if neutrality, justice, affection, and gratitude, could have exempted any government and nation from injury from France, the nation and government of the United States might justly have claimed this exemption. But what weight has justice, with a government without principle, without religion, and without an interest in the prosperity of the people over which it is placed ! If the French government had regarded only the interest of France, it would have cultivated the affections of America. But the French government, like the false mother indifferent to the life of the child, regarded not the interest of the French nation, but the indulgence of its own passions, and the triumph of its own pride ; which, exalted by success beyond the bounds of moderation, sought to humble all authorities in universal prostration at its feet. She commenced and prosecuted spoliations of our trade to an extent that threatened its ruin : and the mischievous effects are displayed in the losses of our merchants, the scarcity of money, and the languishing state of our commerce and agriculture. The American government patiently and peacefully sought redress by negotiation ; but the presumption and rapacity of France rose, in proportion to the patience and peace of America, and, with unexampled insolence, she repeatedly drove away our ambassadors sent to claim only an exemption from injury, and a payment of just debts ; required us, by an ignominious tribute and bribe, to double the damage we had suffered : and threatened us, if we refused this, with war and ravage on our coasts, burning of our towns, and even dissolution as a nation.

What could have swelled the insolence of France to this pitch of extravagance ? Had we done her any injury ? She can shew none. Was it her great success and

mighty power? We are at a distance to defy her power. *Dec. Sess.*
 How then dared she thus to insult and injure us? She *1798.*
 accounted us a divided people, split into factions among
 which she had zealous partizans. In this state, she
 knew, we must be an easy prey: in this state she knew,
 we could make no resistance. And, while we remained
 in this state, she might safely persist in her proud op-
 pression: and she did so. For men, without regard to
 religion and justice *will* do whatever they *can* do: and
 nothing but resistance and force will restrain them from
 injuring others. France had long known and promoted
 divisions and factions among us. And had sent spies
 into all parts of our country, to procure information of
 our circumstances and opinions. These travelled
 through America, under various pretexts, of curiosity,
 of philosophy, or of avoiding tyranny or persecution at
 home. This Talleyrand, who demanded the bribe and
 loan from our ambassadors, travelled through America,
 as an emigrant; and after his return to France, was
 appointed minister of foreign affairs. From its spies
 and other agents here, the French government received
 constant intelligence of the sentiments of the citizens,
 and the measures of the government of America; and
 was thus prepared to promote its own views, and de-
 feat ours.

If ever there was a time, in which it was proper for
 any government, to order aliens to depart out of its
 territory, it was proper for the American government
 to do so at this time. In other countries, this would
 have been done by a proclamation of the executive.—
 This was a new case under the American constitution,
 and proper for the interference of the legislature. Con-
 gress, therefore, passed "*An act concerning Aliens*,"*
 the substance of which, in its own words, I shall here
 state.

"*It shall be lawful for the president of the United States,*
to order all such aliens, as he shall judge dangerous to
the peace and safety of the United States, or shall have
reasonable grounds to suspect, are concerned in any trea-
sonable or secret machinations against the government

* 25th June, 1798. 5 U. S. L. 143.

Dec. Sess. 1798. *"thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order. Which order shall be served on such alien, by delivering him a copy thereof, or leaving the same at his usual abode, and be returned to the office of the secretary of state, by the marshal or other person to whom the same shall be directed."*

But, *"if any alien so ordered to depart shall prove, to the satisfaction of the president, by evidence to be taken before such persons as the president shall direct, that no injury or danger to the United States will arise, from suffering him to reside therein, the president may grant a license to such alien to remain within the United States, for such time as he shall judge proper, and at such place as he shall designate. And the president may also require of such alien to enter into bond to the United States, in such penal sum, as he may direct, with one or more sufficient sureties, to the satisfaction of the person authorised by the president to take the same, conditioned for the good behaviour of such alien during his residence in the United States, and for not violating his license; which license the president may revoke whenever he shall think proper."*

"And if any alien so ordered to depart, shall be found at large within the United States, after the time limited in such order for his departure, and not having a license from the president to reside therein; or having obtained such license, shall not have conformed thereto; every such alien shall, on conviction thereof, be imprisoned for a term not exceeding three years, and shall never after be admitted to become a citizen of the United States."

This law further enacts, *"That it shall be lawful for the president of the United States, whenever he may deem it necessary for the public safety, to order to be removed out of the territory thereof any alien who may be in prison in pursuance of this act; and to cause to be arrested, and sent out of the United States, such of those aliens as shall have been ordered to depart therefrom, and shall not have obtained a license as aforesaid, in all cases, where, in the opinion of the president, the public safety requires a speedy removal. And, if any alien so removed, or sent out of the United States by the president, shall voluntarily return thereto, unless by permission of the*

"president of the United States; such alien, on conviction thereof, shall be imprisoned as long as, in the opinion of the president, the public safety may require." Dec. Sess 1798.

But it is provided, *"That it shall be lawful for any alien, who may be ordered to be removed from the United States, by virtue of this act, to take with him such part of his goods, chattles, or other property, as he may find convenient; and all property left in the United States by any alien who may be removed, as aforesaid, shall be subject to his disposal."*

One would have thought, that a law so reasonable in itself, so conformable to the law of nations, and the practice of all governments, and, while it is altogether consistent with the constitution, so necessary to the safety and defence of the United States; if it did not obtain all praise, would, at least, have escaped all censure. Yet this law was not only vehemently opposed in congress; but even since it was passed, has been reprobated by ignorant, or wicked and seditious men; and, for their vile and selfish purposes, has been held up to detestation, as unconstitutional and tyrannical.— In many parts of the Union, it has been used as a pretext and instrument, to inflame the passions of the people, disturb the peace of the country, destroy respect for the laws, and relax the authority of government; and in one state, to produce such a commotion, as threatens an insurrection, if not a separation from the Union.

It is proper for men in all stations, and peculiarly in my station, to endeavour to counteract such mischievous passions, and miserable consequences. With this view, I shall examine the objections, which I have observed to have been offered against this law, solemnly established by the authority of the United States.

I. It is objected to this law, that it is contrary to the express words of the constitution.

We perhaps ought not to wonder, that this objection is made. Added to the want of sense and knowledge in some of the objectors, of modesty in most of them, and the general disposition, from prejudices excited and nourished by slander, to believe every act of administration wrong; the habit of opposition prepares their minds to

Dec. Sess. make and receive it. For a habit of opposing every
 1798. thing makes dreadful havoc, not only on the feelings
 and conscience, but on the understanding itself.

This objection is made on two grounds.

The first is, that the constitution declares, that "the migration or importation of such persons, as any of the states now existing shall think proper to admit, shall not be prohibited by congress, prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.*" From this it is inferred, that, as congress cannot yet prohibit such migration or importation, they cannot remove the persons who have migrated or been imported; for this, it is said, would be, in effect, prohibiting the migration or importation.

It is well known, that the prohibition in view respected only slaves. This was universally understood, at the time of the publication of the constitution, during its discussion, and ever since. All the members of the convention know this. The speaker of the house of representatives of congress, who was a member of the convention, did, in the argument on this bill, in a committee of that house, expressly declare this to have been the avowed sense of the convention, on this clause of the constitution; and no man, of any knowledge of the subject, has ever seriously entertained a doubt of this.† The convention was so averse to the traffic in human beings, that they would not directly name slaves, slavery, or the slave trade. The southern members thought

* *Art. 1 sect. 9.*

† *In the debates on the federal constitution, in the Virginia convention, Mr. Mason, a member of that and of the general convention, who refused to sign and refused to ratify the constitution, stated, that in the general convention, "the subject of commerce and navigation was often under consideration, and that eight out of twelve, for more than three months, voted for requiring two-thirds of the members present in each house, to pass commercial and navigation laws; till a compromise took place between the northern and southern states; the northern states agreeing to the temporary importation of slaves, and the southern states conceding in return that navigation and commercial laws should be on the footing on which they now stand."*

their states not yet prepared for the prohibition of this traffic. The other members agreed to give those states twenty years to think of it. In that space, they would probably abolish the slave trade themselves ; or, after that, congress might do it. In the mean time, the convention would not give slavery the sanction of being expressly named. Instead of the word *slaves*, the word *persons* was used ; and, to correspond with this, the word *migration*, and explanatory of this, the word *importation*, as more properly applicable to slaves, or *persons* considered not as aliens, but as *property*. Or, considering this prohibition as respecting only slaves, we find another reason for this construction, in the power reserved to congress "to impose a tax on such *importation*," while no such power is expressed as to migration ; and thus for construing those words as meaning a different manner of introducing slaves. Congress is restrained from prohibiting their *importation* by sea, or their *migration* by land, into any of the states ; but may lay a duty on their first importation, not on any subsequent migration ; the duty in that case being presumed to have been paid before. While the prejudices or necessities of the states then existing were thus indulged ; the convention confined this indulgence to them, and did not restrain congress from prohibiting the migration or importation of slaves into any state *thereafter to be established* ; but left them to the discretion of congress. Whatever reason may be assigned for it, this is certain, that it was the plain meaning of the convention, and has been the uniform construction of the constitution, that the restraint laid on congress, by this clause of the constitution, applies only to the prohibition of introducing slaves.

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But supposing this not the true construction of this clause of the constitution, and supposing that congress is thereby restrained from prohibiting the migration or importation of any aliens whatever ; it does not follow, as a just consequence from this, that congress can make no law to remove such aliens. A rule will not be extended beyond the strict words, if this extension will promote mischief ; especially if it endanger the safety of the people, which is the supreme law. I would ask whether this restraint, supposing it to respect aliens generally, must not be limited to times of peace ; and

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whether it must govern in extraordinary times of danger, or must then give way to the great rule of self-defence and general welfare? Let us try this construction by the rules of reasoning. It is a rule, that, if an argument prove too much, it is unsound. Suppose a body of Frenchmen, with arms and ammunition, which may be carried for defence, to arrive at Boston, and tell the people there, that they are *persons*, who have migrated, to settle peaceably in the country. Another body of such emigrants, with the same tale in their mouths, arrives at New-York; another at Philadelphia; another at Norfolk; and another at Charleston. Must the state legislatures of Massachusetts, of New-York, of Pennsylvania, of Virginia, and of South Carolina, be convened, to order those several bodies of emigrants to depart out of their several states? Well, the Boston emigrants march peaceably into Connecticut; and the South Carolina emigrants into North Carolina; and so of the others, till they all meet peaceably in Maryland; and then declare, that they are come, by order of the directory, to settle there, and to prevail on the president and congress to give the tribute demanded by the directory. All this they may do; and yet, if congress had proceeded to make a law, to prevent their landing, or effect their removal, we should be told, that congress cannot prohibit the migration or importation of aliens! This seems a strange absurdity. And yet the absurdity of this case is only altered, it is not removed, by substituting the case on which congress has acted. Spies are, at all times, dangerous; they are generally not less, and they are often more dangerous, than open enemies;—and those who corrupt our opinions, and pervert our duties, are the most dangerous of all enemies. A power to make such law is clearly necessary for the general defence and welfare of the United States; the care of which is properly deposited with the government of the United States.

For “The people of the United States, in order to form a more perfect union, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity* ;” established a constitution, by

* U. S. Const. preamble.

which objects of general concern to the nation are properly submitted to the management of the general government. And this government is expressly bound to "guaranty to every state in the Union a republican form of government, and to protect each of them against invasion and domestic violence;"* and has "power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or any department or office thereof."† The restraint or expulsion of aliens, in times of war or danger, has by almost all nations, been considered as a necessary measure of protection and self-defence: and, from the nature of the case, the laws of nations, and the general constitutional authority of the government, I cannot permit myself to doubt, that a power to restrain or expel them necessarily exists in the government of the United States, as in every government charged with the general welfare, the common defence, and protection against invasion and domestic violence. If this be a necessary and proper mean of accomplishing any object, with which the government of the United States is charged, the power of exerting it is clearly vested in that government. The difficulty of obtaining the universal consent of the individual states to any measure, however salutary, was sufficiently experienced, as the great evil to be remedied by the constitution. And a construction of this constitution, were it admissible, will not be favoured, which would leave the general defence of the nation at hazard on the caprice of a single state.

But this law is said to be contrary to the express words of the constitution, because the constitution declares, that "the trial of all crimes shall be by jury."‡

There is one general observation which applies to all the objections to this law drawn from the constitution. It is this; that aliens are not parties to this instrument, and therefore can claim no benefit under it, unless they are expressly named. The constitution is made by the people of the United States. § And for whose benefit? For the benefit of the people of the United States, surely. It is the charter of the privileges of the citizens of the United

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* *Const. Art. 4. sect. 4.* † *Art. 1. sect. 8.* ‡ *Const. Art. 3. sect. 2.* § *Const. preamble.*

Dec. Sess. States, to which none but citizens of the United States
 1798. can thereby claim title. The people of the United States therein limit the power of their government over themselves; but lay no restraint on the power of their government over aliens. This was not in their view at all. Until aliens become citizens, they are in the power of the ordinary legislature. The legislature may receive them, and admit them to become citizens; or may reject them, or remove them, before they become citizens. When they come here, they know, that they come at the discretion of the ordinary legislature, can claim no privileges as citizens, and have no reason to complain, if this legislature remove them, before they become citizens. The legislature may refuse to admit them to become citizens, by enacting, that citizenship shall be acquired only by birth. If the legislature receive them, retain them, and admit them to become citizens; then, and not before, have they a right to claim the benefit of the constitution made for citizens. This is clear reasoning. The citizens who made the constitution, bargained for themselves, and all who, after them, should become citizens; but did not bargain for aliens. Would an American citizen, removing into France, claim as a citizen, the benefit of the French constitution against an act of the legislature? Would a man received, under the laws of hospitality, into the house of another, tell the master of the house, when he orders him to depart, because he suspects him of ill designs; "*I will not go, you have a lease of this house, you have admitted me, I will continue in it under your lease?*" Aliens are tenants at will, and may be removed, at the discretion of the owner. When they become citizens, they become tenants on fixed terms, and cannot be removed, but according to those terms: they are freeholders, and cannot be deprived of their rights, but on a known forfeiture regularly ascertained. If, therefore, aliens have no right to remain, it is no deprivation of right to order them to depart; and if it be no deprivation of right, it can be no punishment; and if it be no punishment, this order may be made without any crime, on the mere suspicion or arbitrary will of the legislature, which, with respect to them is sovereign, as, with respect to citizens, the constitution is sovereign.

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Even a citizen may be deprived of his right to personal liberty, without any actual crime, on the mere suspicion of another, on which a magistrate deems it necessary to require security of the peace. So may an alien be deprived of our indulgence to remain among us, on the mere suspicion of the legislature, that his residence here is dangerous to the public peace. This being no deprivation of right, but the mere denial of a favour; is no punishment, but a mere exercise of the right of self-defence, which the government of the United States, like that of every other nation, may exert at discretion, without any crime or any trial.

All that is said of a right to trial by jury is out of the question. That refers to an investigation of offences previous to punishment, or a deprivation of a right.—Here there is no offence, but a suspicion alledged: and, as even in the case of a citizen, he may be imprisoned, for the security of an individual; so, in the case of an alien, he may be removed, for the security of the nation. And, in this, there is no punishment, because there is no deprivation of a right. It is neither an injury nor a punishment; it is a measure of self-defence, inherent in every owner of a house, to turn out of his house a stranger, whom he does not choose to entertain longer.

I will again put the case of a stranger, admitted, under the laws of hospitality, into a house. The owner thinks he has reason to suspect, that this stranger intends to rob or murder him; or to assist a gang of thieves, whom he suspects of this intention. He tells the stranger, that he has such suspicion; and desires him to depart. If the stranger say, "*your suspicions are wrong, you must prove them, carry me before a magistrate, and let me be tried and convicted before you take upon you to turn me out of your house;*" would this be an answer? Shall the master of the house, in order to give the stranger the privilege of being tried and convicted, give him and his associates an opportunity of accomplishing the wicked purposes suspected? Suppose the master of the house reply, "*I am not well acquainted with your character, but, whatever it be, I have a right to turn you out; go to my steward, and if you can so explain yourself to him, as that he choose to permit you to remain, I agree; but, if he order you to depart, you must go,*" would not this be

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reasonable. Would this be any punishment of the stranger? No; it is the right of self-defence. But, as a right to exercise this power will not authorise the master of the house wantonly to beat the stranger, or violently to take his money from him; so a right, to remove an alien from our territory, does not authorise a power to punish him without a trial by jury.

That aliens, before they can be punished, or deprived of any right, for an offence, must be tried by a jury, results not from the express words of the constitution, which refer not to them, but to citizens. It results from this, that our courts know no other mode of trial, and have no authority to adopt any other.

2. But, if this law should not be contrary to the express words, it is objected, that it is contrary to the principles of the constitution, which distributes the legislative, judicial, and executive powers into three departments, while this law confounds them all in the executive; and this, it is said, establishes despotism.

I might rest the answer to this objection, of a confusion, and accumulation of powers being a violation of the constitution, on the observation already made, that this law operates upon none, for whose benefit the constitution was established, or whom the constitution was intended to affect; and cannot, therefore, be a violation of the constitution. It operates only on aliens. No citizen has any despotism to fear from this law. Any citizen may, notwithstanding this law, plot as many "treasons, stratagems, and spoils," as he pleases; and, if he can escape the judiciary, may bid the president defiance.

But, the fact is, there is no confusion of powers in this law, but such as convenience or necessity, consistently with the principles of the constitution, introduces into many other laws, to which no man would dream of objecting.

The constitution has not established, and no human constitution can establish a perfect, but only a modified separation of powers. What work of man is perfect? It is very common, and it is convenient and necessary, for the legislature to pass a law fixing certain principles, and leaving it to some other part of the administration, the executive or judiciary, to ascertain the cases to which

such principles shall be applied, to detail the minute modifications, which no foresight can suggest, and experience alone can disclose ; or to pass a law, which shall operate on a certain contingency, leaving it to some other part of the administration to declare when this contingency occurs, and the law begins to operate.—*Dis. Seff.*
 This lessens not the authority of the legislature ; for such discretion cannot be exercised by any other part of the administration, without the authority of the legislature ; may be restrained, corrected or suppressed, whenever the legislature thinks fit ; and is, therefore, altogether under the control of the legislature. *1798.* The legislature, therefore, only determines something, which it is necessary for them to determine ; and leaves it to some other part of the administration, as cases shall occur, to determine something else respecting this, which the limited powers of man, the principles of just discrimination, and public convenience render it impossible for them to determine. Were the legislature to take upon them to modify their laws to every case, they must be constantly in session ; and human capacity would render it impossible for any one body of men, to discharge their task. Therefore the legislature wisely contents itself with establishing general rules, and leaves, to some other part of the administration, authority to ascertain the modifications and exceptions. Thus the legislative power determines, that certain actions shall be punished ; but as there may be degrees of such actions, more or less aggravated, leaves it to the judiciary to ascertain the degree of punishment ; and, as, in some cases, all punishment may be dispensed with, leaves it to the executive to pardon, at his discretion. All this is necessary for the sake of humanity, justice, and public convenience ; and it seems absurd to say, that the principles of the constitution are thereby violated.

On such principles this alien act is framed. It establishes an authority in the president, "*To order all such aliens as he shall judge dangerous to the peace and safety of the United States, or suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States.*" But, as a general exertion of this authority may not be necessary, it provides, "*That if any alien so ordered to*

Dec. Sess. 1798. depart, shall prove, to the satisfaction of the president, that no injury or danger to the United States will arise from suffering such alien to reside therein; the president may grant a licence to such alien to remain within the United States." What more prudent or proper method could the legislature have adopted? While they were in session, and a war was in view; must they wait, till there was a declared war, or an actual invasion, before they established the principle, that aliens might be removed in a certain manner? When they established this principle, were they obliged to establish it without any exception? Or must they sit or be convened to decide on every case proper as an exception? This would seem, if not absurd and impracticable, at least very inconvenient. Surely the legislature did better. Congress has, by this law, declared, that aliens are removeable; just as that offenders are punishable; and has said, that the president may choose, out of all, what aliens shall be removed, just as he may choose, out of all, what offenders shall be punished. The president may tell any alien, "*I will permit or license you to remain;*" as he may tell any offender, "*I will pardon you.*" And, in doing this, congress has violated no principle of the constitution.

3. Left this law, when tried by the words, and by the principles, of the constitution, should appear unexceptionable, and escape censure; it has been endeavoured to excite a clamour against it, by drawing a melting picture of the distress of aliens, who may thus be ordered to depart out of the country, at the will of one man,

This is all work of imagination. It cannot be denied, that there is a right in the United States, as in every other nation, to remove aliens; and that there may be cases, in which the safety of the nation will render it necessary to exert this right. And, I think, it cannot be denied, that, in the last session of congress, the United States were, if any nation ever was, in a condition that required it as a solemn duty, to exert this right. The rights and safety of individuals must never be put in competition with the rights and safety of a nation. Aliens have but an *imperfect* right, the right of hospitality and civility, to remain in any nation, to

which they are not bound to permanent allegiance.— *Dec. Sess.*
And if the rulers of the nation, in which they have a temporary indulgence to reside, suspect any danger to the nation, from their residence, and order them to depart, they have *no* right to remain. The United States were threatened with danger from France, and by the same means which France has uniformly adopted, to bring danger and destruction on other countries, intestine divisions. Aliens having the least interest in the prosperity of this country, and owing the least duty, only a temporary duty, to it, were the most likely to yield themselves the readiest agents of France. And the little respect which, in this country, is paid to the rights of election, gives them, here, an opportunity of mischief, which they could in no other country enjoy. Though some of our own citizens may be base enough to yield themselves as instruments of a foreign power, the government of the United States has no authority to remove them. But it has, like every other government, in time of danger, authority to expel aliens; and the right and duty of common defence, and protection against invasion and domestic violence, required, that this right of expulsion should be exerted. Nor was the exertion of this right proper only against French aliens. The principles professed by the government of France, have excited through the world an enthusiasm, which nothing, but experience of their destructive consequences, can correct. There is, in all nations, a number of warm speculative men, combined together, to promote the diffusion and prevalence of this theoretic liberty. Many of these, either expelled or flying from their own country, reside in the United States; and are, here, it seems, systematically *united*, not in support of the principles of our government, but, of an imaginary political *millennium*, a government which never existed, and, while man remains as he is, never can exist; in support of the fanciful principles, which, in the progress of its revolution to anarchy and despotism, have brought so much misery on France, and every country, where the arts and arms of France have prevailed. These dogmatists, invincible by reason or experience, united in principles, however dispersed in place, as a nation of themselves,

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are enemies to all governments ; and, like the preachers of a new religion, think all other rights and duties ought to yield to the great duty of establishing their principles. To this duty they will sacrifice all other considerations ; and nothing, however cruel or destructive, that can promote this, will, in their eyes, be a crime. Such men will be dangerous to any country, in which they reside. Instigated by the zeal of proselytism, the apparent benevolence in their principles will give them an irresistible influence on the young and inexperienced. And no country, in which such men prevail, can hope for safety against the arts of France. Nor can any Frenchman more earnestly promote the views and success of France, than any native of any country, who, by adopting her principles, has brought himself within the pale of this new political church. Become citizens of the world, they condemn all distinctions between nations, and cherish all people with equal affection ; the love of country is lost in the love of mankind, and philanthropy extended beyond its natural limits, and exerted beyond its natural force, is wasted in useless or self-destroying efforts. Insensible of error, and deaf to instruction, they are borne forward with the courage of conscience, the ardor of inspiration, and the obstinacy of impenitence, by an impetuous enthusiasm, to all the mischiefs, which guilt could effect. And, wherever there is no hope of conversion while we are in danger, the exertion of the right of expulsion becomes a duty, which the rulers owe to the safety of the nation.

If there may be cases of humanity, which may make this exertion, where not absolutely necessary, favour of severity ; the question is, with whom the power of indulgence may be best lodged, so as best to accomplish the great object, public safety, and most to favour humanity.

As a measure of national defence, this discretion, of expulsion or indulgence, seems properly vested in the branch of the government peculiarly charged with the direction of the executive powers, and of our foreign relations. There is in it a mixture of external policy, and of the law of nations, that justifies this disposition.

It was never known, that a numerous and complex body of men had a more tender conscience, than an

upright individual. Where many do wrong, each can cast the censure from himself upon others. But a responsible individual must take all the burden of the blame. Any man, with any claim to tenderness, would rather risk the success of that claim to an impartial and humane individual, than to a numerous body of men.

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It remains, therefore, only to determine, whether the character of the president be such, as to render him a proper depositary of this power of indulgence. Has the president no feelings of humanity? Is a life of piety and justice no ground of confidence? The character of the president is well known. And no alien, who meddles not with politics and plots, who favours not the views of our enemies, and injures not the peace, safety or defence of the Country, has any thing to fear from this law. Even with respect to dangerous aliens, congress has provided, that the rights of humanity (so far as, consistently with the supreme law, the safety of the people, they can) shall be secured to them. For it is enacted, *that it shall be lawful for any alien, who may be ordered to be removed from the United States, to take with him his property; or, if he leave any of it, that it remain subject to his order and disposal.*

But is all our pity to be extended to strangers; and shall we extend no care to ourselves, our wives, and our children? The French have threatened us with pillage, plunder, and massacre. Such threats they have carried into execution in other countries. They have threatened us with a party among ourselves, which will promote their views. Some of them, it is said, have told us, that we dare not resent their injuries; for there are Frenchmen enow among us, to burn our cities, and cut our throats. And, it seems, we dare not remove those gentle lambs! Gracious Heaven! Are we an independent nation, and dare we not do this? Shall our constitution, intended as a shield to defend, become a sword to wound us? Have we made a constitution, to restrain our administration from oppressing ourselves, and so restrain it, as to submit our cities to alien incendiaries, and our throats to alien assassins?

It is no unreasonable calculation, that there have been, at one time, (and may be now) from twenty to forty

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thousand French, within the United States. There is also a great number of united Irish, and fugitives from other countries, notoriously disaffected to their own, to this, and every other government; and devoted to incessant revolution. If an invasion from France were projected, is any thing but arms, organization, and discipline wanting, to make all these as compleat a French army, as if recruited in France, and transported under her banners to the United States? And will any one say, that the government of the United States, *which is bound to protect each state against invasion*, is not bound, on a reasonable fear of invasion, to remove such internal enemies, before they are armed, organized, or disciplined?

Vain is all our defence against enemies without, if we guard not against enemies within. If we leave an Achan in the camp, can we hope for victory? If we leave a band of traitors in the fort, can we hope to defend it? If we suffer French spies to stroll through our cities, our harbours, our shores, and our country, and give information of all our strength and all our weakness; how can we be guarded against attack? If we suffer them to remain here, to give information of every ship that sails, that it may fall into the hands of some French privateer; how can we protect our trade? If we suffer French agents to remain here, to corrupt the minds of our citizens, our printers, and our officers, to pry into our councils, purchase our arms and ammunition, influence our opinions and elections, render our people careless, and our administration weak; what have we to expect, but all the horrors of a French invasion? What have we to expect, but to see our houses in flames, and our families in blood?

I trust in God, that this will not happen. I trust, the measures adopted by our administration, with cordial union among ourselves, will preserve us from this calamity. But, if it should come upon us, we will curse those, who have lulled us with a sweet song of security, and gentle fraternity of the French, who, professing motives of oeconomy, have endeavoured to tie up the hands of the administration from effectual measures of defence; and, under the pretence of valuing and seeking peace, do, in the surest manner invite war.

We are, at present, in a perilous state, and it is to

be feared, on the brink of some calamity. Menaced with the resentment of a foreign nation, we are distracted among ourselves. In proportion to our dissensions, will be our danger: and our safety lies in love to our constitution, and confidence in our administration. If the people will cordially unite in supporting active measures of the administration, France will change her tone, from resentment to complacency. But experience of her conduct towards all other nations must convince us, that it is her means only, and not her object, that she will change. Her object will remain the same, to reduce us to a subjection to her will. — Let us beware, therefore, of supposing, that, when she *speaks* peace, she *means* peace. She will speak peace, while we support our administration; and again war, whenever she can persuade our people to oppose the administration of their government. *Divide and subdue* is her maxim.

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With a view to lessen the grounds of distrust in our administration, so fatal to our own interest, and to increase that confidence in it, so essential to our safety; I have endeavoured, with candour and care, to examine the principles of a law, which has been made a pretext for vehement clamour. I have, I think, shewn, that it is constitutional and necessary. I have said (what is well known) that there is such ground of confidence in the president, that there is no fear that he will suffer it to operate against any alien, who comes and remains honestly and innocently among us; and that he will exercise his authority only against aliens, who use the opportunity of their being here, for the purpose of disturbing our peace, alienating the minds of our citizens from our government, betraying our situation, corrupting our measures, or weakening our defence. And, I hope, it will appear, that, if our rulers had not exerted this authority, we should have had just reason to say, that they had betrayed their trust.

O! if the people would but love their constitution, and confide in its wise and honest administration, and turn away from those who harass their minds with vain suspicions; how happy might we be! May the God of wisdom open our eyes to the excellence of our constitution, and the purity and prudence of our administra-

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tion; and to the folly, madness, and wickedness of those demagogues, who mislead this people from their interests and duties, and glory in their guilt. May he wean us from all partialities and prejudices towards any foreign nation; unite our hearts in love, and support of our government; and preserve us from the machinations of a government, ambitious, desperate, faithless, and corrupt; which flatters, only to deceive; and caresses, only to destroy.

No. XXVII.

Importance of Public Institutions for Instruction.

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A REPUBLICAN government on the principles of representative democracy, so modified as to secure its own preservation and the welfare of the people living under it, is one of the noblest efforts of political skill. It is most honourable to the author of our nature, and to the pride and dignity of man; providing equally for each a station adequate to his merit; and directing the force of all to the good of all. This is the estimate which, in theory, is made of a representative democracy: whether, in practice, it will deserve this praise, will depend on the virtue and wisdom of the people. Among a wise and virtuous people, it may be the best, and, among an ignorant and wicked people, the worst of all forms of government.

In scripture, folly is synonymous with vice, and wisdom with virtue. Accordingly virtue is often in proportion to wisdom, and both are essential qualifications of those who are to have any influence in public affairs. Wisdom depends on talents and experience. Education is a system of experience, by which the mind is trained up to wisdom. Providence has not given to all men equal talents, nor to all of equal talents equal education. Supposing, therefore, (what in fact there is not) equality of virtue, there must be inequality of wisdom, and there must be some men more fit than others for public

station. But, as the permanence of the government, *March Sess.* and the welfare of the people, depend on the virtue and 1799. wisdom of the people; and as virtue may be said generally to be in proportion to wisdom; it becomes the duty of a state, in whose government the whole people partake, if it would preserve its own and its people's welfare, to exert all its means to make its people equally wise; since it has made them equally powerful.—Equally wise it cannot make them, since Providence has established inequality of talents. But, as wisdom depends also greatly on education, a state may, as far as is consistent with other important duties, remove the inequality of education, by affording to all its citizens competent means of instruction in the most essential articles of education. Protection of the body from danger and disease is not more a duty, than protection of the mind from ignorance and vice.* The importance of the duty is in proportion to the value of the object, and as the mind is more valuable than the body, more susceptible of improvement, and more characteristic of our species, the duty of improving it becomes the more important.

The monuments of human industry, the wall of China, the pyramids of Egypt, the Roman aqueducts and ways, the canal of Languedoc, a city, a palace, a castle, or a ship, fill the mind with admiration. But human industry produces nothing useful and great, till it is directed by learning. Nature has not more distinguished one species from another, than education has distinguished one man or one nation from another.—Compare a savage with a sage, and you seem to contrast a brute with a man, or a man with an angel. View an Indian hut or canoe, together with an English palace or ship of war, and estimate the difference between ignorance and learning! No man or nation ever attained grandeur, without a sedulous cultivation of learning science and religion. The nation who neglects the establishment and cultivation of learning science and religion, neglects the only means of real refinement, prosperity, and happiness. Among an ignorant people,

* *Vattel*, B. 1. *sect* 112—3, 129—30.

March Sess. 1799. there will be no means of discerning truth, detecting falsehood, or preventing misrepresentation; and, if this people live under a democratic form of government, they will be peculiarly unfortunate. Disturbed by the violence of conflicting passions, distracted by the malignity of tempestuous factions, duped by the machinations of ambitious intrigues, and harrassed by the jealousies of ignorance and error, they will be deluded by one falsehood after another, and hurried on from folly to folly, their social state will be miserable, and their government unsteady, fluctuating, ineffectual, and short lived. Without learning and religion, there will not be knowledge and virtue. And without knowledge and virtue, liberty will not be a blessing, but a curse; it will be a sword in the hands of a fool, to wound himself; it will be firebrands, arrows, and death, in the hands of a madman, to cast about in sport.

No duty, therefore, is more incumbent on a government, whose people are free, than to make them wise and good. Without this, liberty will neither be useful nor lasting. In most nations, some institutions for public instruction are maintained at public expence; and, in all, more or less of the burden is left for individual exertion. The concurrence of both seems necessary for an extensive and useful effect. And, I think, no man of any reflection will doubt that public instruction is a public duty, and an important object of government; and that the importance of this object and duty is greater, in proportion as the government is freer. For the instruction of the people ought to be in proportion to their power. In other countries, where power is in the hands of a few, great pains and expence are bestowed, to educate them for the exercise of it. Ought a people, who have the power in their own hands, to spare pains or expence in qualifying themselves for its exercise? Government is established to enforce the welfare of society, and every thing essential or conducing to that, is an essential or important duty of government; though the benefit to many individuals be not immediate, and to some perhaps there be no benefit. If to provide a gaol and a gallows, a judge and an executioner, be a public duty, in order to punish vice; is it not a nobler duty to prevent vice, by enlightening the mind

with knowledge, inspiring it with the love and esteem of virtue, furnishing it with motives to duty, and thus breaking the force of those passions, whence spring crimes and disorder? Civilized nations, therefore, have their temples and their colleges, their priests and their preceptors. In Sparta, the children were considered as the property of the state, and educated by the public care, at the public charge. Among the Jews, whose civil polity was dictated from Heaven, a whole tribe were dedicated to the cultivation of religion, and the science of their laws, were exempted from the service of war, maintained by stated contributions of the whole nation; and had no peculiar inheritance allowed them among the other tribes. In Greece and in Rome, religion was cultivated by public establishments, and philosophers devoted their time and their science to the education of youth, and received high rewards. In modern Europe, religion has every where been maintained at public expence, and universities, colleges, academies, and other schools have been occasionally founded and endowed, and regularly supplied with learned professors and masters, paid by salaries annexed to the institutions. In the small kingdom of Scotland, besides many schools supported by private foundations, many private lectures and schools, depending for support on the scholars, there are five universities, and nearly a thousand schools, supported by established funds and filled with masters.* The benefit of those institutions is well shewn, in the character and acquirements of the people of that country.

In America, the diversity of opinion, and a zeal for liberty, more excuseable than intelligent, have generally prevented or discouraged public institutions of this kind, and submitted instruction, in religion and literature, to the discretion of individual liberality or interest. Yet, in some states, public instruction, both in religion and literature, is put under the protection of government, and without violation of the rights of conscience and freedom of will, regulated by law, and supported by public authority. The states, in which these institutions

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* Every parish has at least one parish church and minister, and a parish school, supported by a kind of land-tax.

March Sess. prevail, are the wisest, and the best governed; and to them may be attributed the general prevalence of piety, knowledge, and rational liberty in those New England states.

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It were happy for other states, if, by means of similar institutions, similar effects could be produced. In the territory of the United States, west of the Ohio river, congress directed, that, in surveying the townships of six miles square, there should be reserved, in the centre of each township, a tract of two miles square. Those reservations may be happily improved to the salutary purpose of public instruction.

The constitution of Pennsylvania has directed the legislature, to "provide by law for the establishment of schools throughout the state, in such manner, that the poor may be taught *gratis*."* Either from parsimony, peculiarly censurable when indulged to defeat an useful purpose, or from the difficulty of combining in one direction the opinions of many, or from some perplexity in the subject; only some feeble attempts have been made, to comply with this important injunction of the constitution. It yet remains, therefore, unexecuted; and to every man who has reflected on the value of the object, will be a standing monument, that the exercise of the powers of government ought to be accompanied with wisdom. To delay the establishment of these institutions, till every man, or perhaps the people generally, understand their importance, and approve their establishment, will be to delay passing the river, till all the water run down, or to delay administering the medicine, till the disease be removed. Opposition to such institutions generally results from ignorance; and ignorance cannot be removed without such institutions. The wiser part of the state ought to unite their exertions, to promote institutions for public instruction: when their effects are felt, they will be valued; and the fogs and darkness of opposition will flee before the rising sun of science.

But, if it should be thought imprudent to attempt the introduction of these institutions, on an extensive scale at once, no opportunity ought to be omitted of pro-

* *Art. vii. sec. 1.*

moting their establishment by degrees. Every step made in the progress shortens the distance to the end.—

Every new institution for public instruction takes from the dominion of ignorance, and lessens the opposition to establishing those institutions on a great and general plan. Every advantage gained by science weakens its enemy; and, if it cannot scale the walls of ignorance, it may gradually undermine their foundation.

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In the support given to the university in Philadelphia, to the college in Carlisle, and to several other institutions of inferior note, something has been done to promote the views of the constitution. The college of Carlisle has proved itself peculiarly useful, and well deserving the patronage of the government. Other institutions, when their funds become active, will, it may be hoped, contribute to the diffusion of knowledge, the stability of government, the preservation of liberty, and the improvement of society. Let the legislature, therefore not stop, but, until they can accomplish the great plan of a general establishment of institutions for public instruction, let them seize every favourable occasion of making partial establishments, which will gradually lessen the great work to be accomplished, and facilitate the way to a general scheme.

A favourable occasion now offers itself to the legislature of establishing useful institutions, in some parts of an extensive country, which will soon be divided into five or six counties; and which, as it most needs, is least able to procure the means of instruction. At Presqu'ile, at Le Bœuf, and at the mouth of French creek, of Conewango, and of Beaver creek, tracts of land were reserved, and towns laid out, for the use of the state. Some part of each has been sold, and some remains unsold. If the legislature would incorporate trustees of an academy, at each of those towns, and endow them severally with the unsold part of those tracts, useful foundations might thus be established at very little cost to the state. It can be no objection to this plan, that the state has not land, to provide, in this manner, for other parts of its territory. This land, divided among all the counties, would be altogether insignificant; and the state has already given to institutions of this kind, in some counties, larger donations than this, while, in other

March Sess. counties, none have been given. What I have proposed
 1799. could be easily done now, and whatever is thus done
 will diminish the task to be accomplished, when a general provision shall be made according to the injunction of the constitution.

In forming new counties, opportunities will occur, without any eventual expence to the state, of making useful provision for a public school in each county town. If trustees for that purpose were incorporated, and enabled by law, and by a loan of money from the state, to purchase a quantity of land for a town and outlots; the sale of the lots, with proper reservations for public purposes, would enable the trustees to repay the money lent, and to lay an useful foundation for a public school.

Those county schools might be nurseries for supplying township schools with qualified masters; and thus, and by a general superintendence, might bring the system of education to an uniform and improved state.

It is a melancholy prospect, and gives but poor hopes of the rising generation, to see in what hands the education of youth in this country generally is. Any man, fit for nothing else, thinks himself fit for being a schoolmaster, and parents generally have no choice, and must be content with any one that offers. To remedy this evil, which all must allow to be great, a prospect of permanency and profit must be given to the instructors of youth, that will justify and reward the exertion of competent qualifications, and render the station of a schoolmaster respectable. This cannot be done, except perhaps in cities and populous towns, without the aid of government: In the country generally, there will be such diversity of opinion, such caprice of parents, and such thinness of population, as will defeat all hope of procuring respectable or useful schoolmasters. A man qualified for this important station will find, in many others, a better reward for his industry. Were the reward competent, his state will be continually imbittered by the dependence, in which a temporary engagement, and caprice and partiality of parents, will place such a schoolmaster, if, in doing his duty, he desires to avoid giving offence. This will also prevent that salutary discipline, so necessary to education, and will foster, by indulgence, violent passions destructive of peace. To

remedy these evils, and promote the useful and general *March 25th.*
 instruction of youth, public authority must establish *1799.*
 funds, to aid individual exertions. Schools will thus be
 more numerous and permanent; masters better quali-
 fied; parents, less arbitrary, will be better pleased; and
 youth better instructed. In this country, at present, if
 a man can but read, write, and cypher, he is considered
 as well educated, and fit for any office; and a tolerable
 education, for one son, much less for many, cannot be
 obtained, but at an expence which few parents can
 afford. Hence we often see offices, and even the learned
 professions, occupied by men of an education very inad-
 equate to their station. This is injurious to our inter-
 ests: it renders offices contemptible, and professions
 fordid. No nation can ever be respectable, while offices
 and professions are so occupied; and it is incumbent on
 the state, to wipe off this stain on its reputation.

Some may say, that those only who have children
 should maintain schools.

This is a burden to which they are generally not
 competent. Where any thing, which ought to be done,
 cannot be done by the individual exertions of those im-
 mediately interested, it becomes the duty of the state to
 do it; for it results from the nature of a society, that
 the burdens of each should be borne by all. Ignorance
 is a public evil, and, like other public evils, must be
 removed at public expence. Instruction is a public
 blessing, contributing to the general peace and prospe-
 rity of the country. Every man of education adds to
 the stock of wisdom and experience; and, more than
 wealth, promotes the improvement of the country. By
 instruction, to eradicate or correct dangerous passions
 is as much a public duty, as to restrain a madman or
 robber, or to guard against the ravages of fire. Ob-
 jections, of the kind now supposed, would defeat all the
 purposes of society and government. Were such objec-
 tions to prevail, no money would be raised for a court-
 house; for many would say, "We never go to law, let
 those who use it build a court-house." In like manner,
 there would be no roads, no bridges, and no public
 officers; for great part of the expence of these must be
 collected from men, to whom they are of no peculiar or
 immediate benefit. It is only because we have not

March Sess. 1799. *been* accustomed to institutions for public instruction supported, more or less, at public expence, that we object to this manner of supporting them, more than any other public benefit. After experience of their utility, all good men would cheerfully contribute to their maintenance. They are proper objects of the care of government, and the constitution has expressly sanctioned and enjoined them. It is, therefore, the duty of the legislature, to proceed, without delay, in the most prudent and useful manner, to their establishment. Nothing will have a more happy tendency to preserve our liberty and our government: for these will never be safe or useful, while ignorance or vice prevails among our people; and these will prevail, till institutions for public instruction are cherished by the government.

With a hope, that these Sentiments may make a favourable impression, I refer them to serious consideration; and turn to our immediate and peculiar duties.

FINIS.



